No. 97-16-CFX Title: Ohio Forestry Association, Inc., Petitioner
v.
Sierra Club, et al.

Docketed: July 1, 1997 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Jul 1 1997	Petition for writ of certiorari filed. (Response due September 2, 1997)
	Jul 14 1997	Order extending time to file response to petition until August 29, 1997.
	Jul 25 1997	Order further extending time to file response to petition until September 2, 1997.
	Aug 5 1997	This extension is granted for all respondents.
	Sep 2 1997	Brief of the Federal Respondents in opposition filed.
	Sep 2 1997	LODGING consisting of one letter from forest supervisor,one copy of forest plan estimates, one letter to forest managers, one copyof Wayne Natl. Forest Plan, and one copy of environmental impact statement submitte by the Solicitor General
	Sep 2 1997	Brief of respondents Sierra Club, et al. in opposition filed.
	Sep 15 1997	Reply brief of petitioner Ohio Forestry Association, Inc. filed.
	Sep 15 1997	LODGING consisting of two lower court documents submitted by counsel for the petitioner.
	Sep 17 1997	DISTRIBUTED. October 10, 1997
	Oct 14 1997	REDISTRIBUTED. October 17, 1997
	Oct 20 1997	Petition GRANTED. SET FOR ARGUMENT February 25, 1998. **********
	Nov 26 1997	Order extending time to file brief of petitioner on the merits until December 16, 1997.
	Dec 5 1997	Brief amicus curiae of Pacific Legal Foundation filed.
	Dec 16 1997	Joint appendix filed.
	Dec 16 1997	Brief of petitioner Ohio Forestry Association, Inc. filed.
	Dec 16 1997	Brief amici curiae of Alabama Forestry Association, et al. filed.
	Dec 16 1997	Brief amicus curiae of Southeastern Ohio Oil & Gas Association filed.
	Dec 16 1997	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Dec 16 1997	Brief of the Federal Respondents filed.
	Dec 16 1997	LODGING II consisting of a letter re: Vegetative Treatments in Kachelmacher Project Area,(11/20/92), letter re: Vegetative Treatments in Miller Run Project Area, (11/20/92), Final Environmental Impact Statement and Draft Environmental Impact Statement, submitted by the Solicitor General.
	Dec 19 1997	Order extending time to file brief of respondent on the merits until January 26, 1998.
	Dec 22 1997	CIRCULATED.
	Dec 30 1997	Record filed.

No. 97-16-CFX

Entry	Date	Proceedings and Orders
	Jan 5 1998	Record filed.
	Jan 15 1998	Record filed.
	Jan 15 1998	Motion of the Solicitor General for divided argument filed.
	Jan 26 1998	Motion of the Solicitor General for divided argument GRANTED. to be divided as follows: petitioner - 15 minutes; the Solicitor General - 15 minutes; respondents - 30 minutes.
	Jan 26 1998	Brief of respondents Sierra Club, et al. filed.
	Jan 26 1998	Brief amici curiae of Forest Service Employees for Environmental Ethics, et al. filed.
	Jan 26 1998	Brief amici curiae of Institute for Fisheries Resources, et al. filed.
	Jan 27 1998	LODGING consisting of six documents submitted by counsel for the respondent.
	Feb 12 1998	Reply brief of the Federal Respondents filed.
	Feb 12 1998	Reply brief of petitioner Ohio Forestry Association, Inc. filed.
	Feb 12 1998	LODGING III consisting of twelve copies of Amendment 11 to the Wayne Natl. Forest Plan, aubmitted by the Solicitor General
	Feb 25 1998	ARGUED.

Supreme Court, U.S.
FILED

(1) 97-16 JUL 1 1997

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is there a justiciable controversy on Respondents' facial challenge to a long-term federal land use plan (the Forest Plan for the Wayne National Forest), where that Plan does not provide authority to engage in any ground-disturbing activity?

2. If jurisdiction exists, did the Court of Appeals err on the following merits issues:

a. Does the Forest Service's adherence to Acts of Congress constitute judicially remediable bias?

b. Does the National Forest Management Act in general, and 16 U.S.C. 1604(g)(3)(F)(v) in particular, prohibit one of the two basic systems of forest management -- even-aged management of tree stands -- in national forests except in "exceptional circumstances," and require that timber production be limited to protect and preserve primitive recreational experiences?

PARTIES TO THE PROCEEDINGS

Petitioner Ohio Forestry Association, Inc. was an appellee before the court of appeals, and an intervening defendant at the district court level. The Chief of the United States Forest Service within the Department of Agriculture (then Jack Ward Thomas and currently Mike Dombeck) was the lead appellee before the court of appeals and lead defendant at the district court level. The other named defendants, who were appellees in the court of appeals, are also Department of Agriculture officials: the Secretary of Agriculture (then Mike Espy and currently Dan Glickman), the Regional Forester for the Eastern Region (then Floyd J. Marita and currently Robert A. Jacobs), and the Forest Supervisor for the Wayne National Forest (then Eurial E. Turner and currently the Acting Forest Supervisor is Jose Zambrana). The Sierra Club and the Citizens Council on Conservation and Environmental Control were the appellants before the court of appeals and plaintiffs at the district court level.

The names of the current federal officials have been substituted pursuant to Rule 33. Pursuant to Rule 29.6, Petitioner states that the Ohio Forestry Association, Inc. has no parent or subsidiary corporations.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

OHIO FORESTRY ASSOCIATION, INC.,
Petitioner,
v.
SIERRA CLUB, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

The Ohio Forestry Association, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The January 21, 1997 opinion of the Sixth Circuit Court of Appeals reversing the grant of summary judgment to defendants is reprinted at App. A and is reported at 105 F.3d 248. The April 7, 1997 order of the Sixth Circuit, denying rehearing and rehearing *en banc* is reprinted at App. F. The March 11, 1994 opinion of the district court granting summary judgment in favor of defendants is reprinted at App. B and is reported at 845 F. Supp. 485. The district court's opinion excluding evidence going beyond the administrative record is reprinted at App. C. The 1990 and 1992 administrative appeal decisions affirming the legality of the Wayne National Forest Plan are reprinted at Apps. D and E, respectively.

JURISDICTION

The court below entered its opinion and judgment on January 21, 1997. Petitioner timely sought a panel rehearing and rehearing *en banc* on March 3, 1997. This Petition is being filed within 90 days after the April 7, 1997 denial of

rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of the United States Constitution, and of the National Forest Management Act and other National Forest System laws, are reprinted in App. H.

STATEMENT OF THE CASE

This case concerns the justiciability of a facial challenge to a forest plan and, if jurisdiction exists, merits issues on management of the National Forest System.

1. The National Forest System comprises over 188 million acres of federal lands. *See* 16 U.S.C. 1609; 36 C.F.R. 200.2 to .3. The System is managed by the United States Forest Service, an agency within the Department of Agriculture. Under the 1897 Organic Administration Act, "[n]o national forest shall be established, except . . . for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. 475.

The Multiple-Use Sustained-Yield Act of 1960 ("MUSYA") states the "policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Id.* § 528. The broadened multiple uses were not to be exercised "in derogation of" the purposes expressed in 16 U.S.C. "section 475." *Id.* Thus, timber production remains one of the primary purposes for national forests, and multiple uses such as recreation are "*secondary*" to those purposes. *United States v. New Mexico*, 438 U.S. 696, 707-15 (1978). "[S]ustained yield" means achievement of "a high-level annual

or regular periodic output of the various renewable resources" -- for example, by timber sales. 16 U.S.C. 531(b).

2. The National Forest Management Act of 1976 ("NFMA") created a duty to prepare a "land and resource management plan" ("LRMP" or "forest plan") for each national forest or group of national forests. 16 U.S.C. 1604(a). The NFMA reaffirmed the multiple use mandate for national forests. A forest plan must "provide for multiple use and sustained yield of the products" (*e.g.*, timber products) from the national forest "in accordance with the Multiple-Use Sustained-Yield Act." *Id.* § 1604(e)(1).

3. The 36 C.F.R. Part 219 regulations explain forest planning (§§ 219.10 to .12) and provide direction on particular resources (§§ 219.13 to .27). In general, before a forest plan is adopted, demand for the various resources is assessed, public comments are solicited, and draft and final environmental impact statements ("EISs") describing alternative forest plans are prepared under the National Environmental Policy Act ("NEPA").

A forest plan can remain in effect for 10 to 15 years, after which it is replaced by a revised forest plan. 16 U.S.C. 1604(f)(5); 36 C.F.R. 219.10(g). Thus, a forest plan provides long-term planning direction.

Typically, a forest plan and accompanying documentation do not analyze, contain final decisions on, or authorize any specific project in a national forest. After the forest plan is adopted, a ground-disturbing project (such as a timber sale) that is consistent with a forest plan may be proposed, analyzed under NEPA and other laws, and approved by the Forest Service. Adoption of a forest plan does not dictate the occurrence of, nor serve as the final authorization for, any

ground-disturbing project (and its environmental impacts and injuries). The Eighth Circuit summarized the Forest Service's position on the relationship between forest planning and later site-specific projects, in concluding that Article III standing is lacking on a facial challenge to a forest plan:

> A forest plan, such as the Ouachita Forest Plan, is a general planning tool. It provides guidelines and approved methods by which forest management decisions are to be made for a period of ten to fifteen years. Adoption of the Plan does not effectuate any on-the-ground environmental changes. Nor does it dictate that any particular site-specific action causing environmental injury must occur. Indeed, before an environmental change can come about, several events must transpire. First, a site-specific action (*e.g.*, a timber sale) must be proposed and found to be consistent with the Plan. Next, the action is subject to NEPA and NFMA analysis and public comment. Finally, the Forest Service must adopt the action. Finding an environmental injury based on the Plan alone, without reference to a particular site-specific action, would "take[] us into the area of speculation and conjecture."

Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994); *see* App. 18a, 75a, 87a-88a; Michael J. Gippert and Vincent L. DeWitte, *The Nature Of Land And Resource Management Planning Under The National Forest Management Act*, 3 ENVTL. LAWYER 149, 155-59, 166-69, 183-86 (Sept. 1996).

A forest plan allocates lands to specific management areas, each of which identifies a particular mix of possible uses (*e.g.*, a management area featuring primitive recreation and other compatible uses), and determines which lands are suitable for timber production. A forest plan also provides the minimum management prescriptions that constrain future development

proposals within each management area. *See id.*; 16 U.S.C. 1604(f)(1) and (2); 36 C.F.R. 219.11, 219.14.

4. This approach to forest planning was followed for the then-177,701 acre Wayne National Forest in Ohio. App. 12a-13a. The draft and final EISs analyzed seven alternative forest plans, including alternatives that emphasized primitive recreation and de-emphasized timber production.[1] The final Wayne Forest Plan was adopted in January 1988. It represents the mix of multiple uses that the Forest Service believed provided the greatest net public benefits. *See* JA 971-75; App. 12a-13a, 71a.

5. In 1988, the Sierra Club and the Citizens Council on Conservation and Environmental Control ("Plaintiffs") filed administrative appeals challenging the Plan. The Wayne Forest Plan was affirmed in decisions dated November 14, 1990 and January 14, 1992. Apps. D and E.

6. Plaintiffs then brought facial challenges to the Wayne Forest Plan and its final EIS in a Complaint filed on March 18, 1992. The actions that Plaintiffs challenged in their Complaint, and alleged caused them injury, were the adoption of the Wayne Forest Plan and the issuance of the final EIS on the Plan. App. G. Plaintiffs did not bring an "as-applied" challenge -- for example, by alleging that the Plan as applied in a particular proposed timber sale injured Plaintiffs.

The case was assigned to District Judge Graham of the United States District Court for the Southern District of Ohio. Petitioner was granted defendant-intervenor status on

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[1] At the Sixth Circuit level, pertinent excerpts from the administrative record were collected in a Joint Appendix ("JA"). The Draft EIS pages describing the alternatives begin at JA 528.

September 4, 1992. JA 4. Judge Graham dismissed Plaintiffs' claims on the merits in a 39-page summary judgment opinion dated March 11, 1994. App. B.

7. Plaintiffs appealed to the Sixth Circuit. The appeal was briefed and argued in the 1994-95 time period, but was not decided until January 21, 1997. App. A.

8. The panel opinion by Chief Judge Martin rejected the Department of Justice's position that there was no standing or ripe controversy on this facial challenge to a forest plan. App. 3a-4a. While the panel cited the Seventh and Ninth Circuit opinions that found justiciable controversies in analogous circumstances, the panel did not cite, or refute the logic of, the Eighth and Eleventh Circuit opinions finding that no justiciable controversy exists at the abstract level of a forest plan. *See* pages 8-9, below.

9. The panel then issued several unusual rulings on the merits without citing a single supporting case. Nor did the opinion below analyze the structure or legislative history of the statutes being construed, or support factual assertions with citations to the administrative record. *See* App. 5a-8a.

10. One unusual ruling was that Acts of Congress render the Forest Service unlawfully biased in favor of timber production. Judge Batchelder wrote separately because she did "not believe that the majority's undocumented broadside against the Forest Service is appropriate." App. 9a.

11. The other merits rulings were interpretations of the NFMA. The NFMA, in 16 U.S.C. 1604(g)(3)(F)(v), directs the Forest Service to issue regulations which:

> (F) insure that clearcutting, seed tree cutting, and shelterwood cutting, and other cuts designed to regenerate

> an even-aged stand of timber will be used as a cutting method on National Forest System lands only where - . . . . (v) such cuts are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource.

a. The panel interpreted this NFMA provision to mean that "even-aged management techniques will be used only in exceptional circumstances." App. 6a. This interpretation had been expressly rejected in a Fifth Circuit opinion cited by the parties, but not addressed by the court below. *Sierra Club v. Espy*, 38 F.3d 792, 799-800 (5th Cir. 1994) (the "NFMA does not bar even-aged management or require that it be undertaken only in exceptional circumstances").[2]

b. Finally, the court below ruled the NFMA creates a strong "protective spirit" for the "recreational value of wilderness" and that the Wayne Forest Plan is "in excess of the statutory limitations provided in § 1604(g)(3)(F)(v)." App. 6a, 8a. The panel seemed to conclude that the NFMA requires the preservation of primitive recreation first and permits timber harvesting only as a secondary matter. This view of NFMA "protection" also had been rejected in the *Sierra Club v. Espy*, 38 F.3d at 800-03.

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[2] As one commentator has noted, a "squarer conflict on a fundamental issue of forest management is harder to fathom." Somewhat "astonishingly, the Sixth Circuit in *Sierra Club v. Thomas* never discusses or even cites to the Fifth Circuit's earlier ruling. Nor for that matter, does the Sixth Circuit discuss or even cite to the Eighth Circuit's ruling on standing, from which the Sixth Circuit was also dissenting." Richard Lazarus, *Forestry Advance, Wetlands Retreat*, THE ENVTL. FORUM, March/April 1997, at 10.

12. The Forest Service and the Ohio Forestry Association, Inc. timely sought rehearing and rehearing *en banc*. Those requests were denied on April 7, 1997. App. F.

REASONS FOR GRANTING THE WRIT

The facial challenge to this Forest Plan did not create a justiciable controversy. Lacking facts on how the Forest Plan would be implemented, the court below misinterpreted the Plan and the National Forest Management Act. To bolster its decision, the court below impugned the integrity of an entire federal agency. The Court should grant the writ to resolve the well-developed split among five circuit courts on the justiciability issue. If jurisdiction exists, three significant and recurring merits issues, which also produce circuit splits or raise constitutional issues, warrant review.

I. Review Should Be Granted On The Justiciability Issue To Resolve The Split Among Five Circuits,To Address Constitutional Limitations, And For Other Reasons

1. The Court's guidance on the justiciability of facial challenges to forest plans is needed to resolve a well-developed split in the circuits. Five courts of appeal have considered this issue. They have split three-to-two.

The courts finding an Article III case or controversy at the abstract level of a forest plan are the Sixth Circuit in the decision under review; the Seventh Circuit in *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995); and the Ninth Circuit in the 2-1 decision in *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992) and its progeny. The Eighth and Eleventh Circuits have found that a facial challenge to a forest plan presents no justiciable controversy. *Wilderness Soc'y v. Alcock*, 83 F.3d 386 (11th Cir. 1996) (no ripe controversy);

Sierra Club v. Robertson, 28 F.3d 753, 757-60 (8th Cir. 1994) (no Article III standing).[3]

The conflict is well illustrated by a comparison of the claims in this case and the Eleventh Circuit case. *See* App. 13a-47a; 867 F. Supp. at 1033-35. The two cases share virtually identical legal claims, yet the courts reached opposite conclusions on justiciability.

2. The conflicting lower court opinions and law review commentaries[4] fully air the competing legal and policy rationales, but no consensus has emerged. The sheer number of decisions and articles demonstrates that the justiciability of facial challenges to forest plans is an important and recurring issue. The Court should resolve the well-ventilated justiciability issue presented by this Petition and avoid perpetuation of the legal uncertainty.

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[3] Several district courts also have found that there is no justiciable controversy in this situation. *See Wilderness Soc'y v. Alcock*, 867 F. Supp. 1026 (N.D. Ga. 1994), *aff'd*, 83 F.3d 386 (11th Cir. 1996); *Resources Ltd., Inc. v. Robertson*, 789 F. Supp. 1529 (D. Mont. 1991), *rev'd on standing, but aff'd on NFMA merits*, 35 F.3d 1300 (9th Cir. 1994); *Idaho Conservation League v. Mumma*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 20666 (D. Mont. 1990), *rev'd on standing, but aff'd on merits*, 956 F.2d 1508 (9th Cir. 1992).

[4] *E.g.*, Gippert, 3 ENVTL. LAWYER 149 (1996); Beth Brennan and Matt Clifford, *Standing, Ripeness, and Forest Plan Appeals*, 17 PUB. LAND L. REV. 125 (1996); Note, *Failing to See the Forest For the Trees: Standing To Challenge National Forest Management Plans*, 16 VA. ENVTL. L.J. 145 (1996); Kelly Murphy, *Cutting Through the Forest of the Standing Doctrine: Challenging Resource Management Plans in the Eighth and Ninth Circuits*, 18 U. ARK. LITTLE ROCK L.J. 223 (1996); Note, *Loss of Protection As Injury in Fact: An Approach to Establishing Standing to Challenge Environmental Planning Decisions*, 29 U. MICH. J.L. REFORM 857 (1996).

a. As one example of the conflict in legal rationales, the Sixth, Seventh, and Ninth Circuits have reasoned that facial challenges to forest plans should be allowed because forest plans "play a critical role in future Forest Service actions." App. 4a; *accord Mumma*, 956 F.2d at 1515-16. A forest plan's role is that it influences, but does not dictate, later ground-disturbing actions (*e.g.*, a timber sale). *See* pages 3-4, above. The Eighth Circuit has concluded that the logic of the Ninth Circuit "may be no longer viable" in light of Supreme Court precedents (discussed below) that a contingent risk of injury does not confer standing, "even though the Ninth Circuit has continued to rely upon it." *Sierra Club v. Robertson*, 28 F.3d at 760; *see* Martha Colhoun and Timothy S. Hamill, *Environmental Standing in the Ninth Circuit: Wading Through the Quagmire*, 15 PUBLIC LAND L. REV. 249, 257-65, 279-80 (1994).

b. Another rationale invoked by the court below and the Ninth Circuit (in allowing facial challenges) is that plan-level challenges "would forever escape review" unless facial challenges are permitted. App. 4a. The Seventh, Eighth and Eleventh Circuits have found this reasoning unpersuasive. Once a proposed timber sale creates the immediate and certain environmental injury required for standing and the concrete factual situation required for a ripe controversy, plaintiffs "can challenge both the site-specific action as well as the Plan-level decisions underlying the specific action at the second [timber sale] stage." *Wilderness Soc'y*, 83 F.3d at 390; *see Marita*, 46 F.3d at 613-14 n.5; *Robertson*, 28 F.3d at 759. Thus, a plan-level challenge can be presented when an injury is imminent, in a concrete "as-applied" setting.

3. The opinion below also conflicts with this Court's precedents on the constitutional minima for standing and on

ripe controversies. Federal courts must presume that they lack Article III jurisdiction until a plaintiff proves otherwise. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). The decision below has an *ipse dixit* quality that jurisdiction should exist because the court would like to review the forest plan.

The disputed action in a facial challenge (adoption of a forest plan) typically does not cause any imminent environmental injury or any such injury at all. *See* pages 3-4, above. Accordingly, Plaintiffs lack the "*imminent*" and "*certainly* impending" injury required for Article III standing when they challenge a forest plan in isolation from any timber sale or other ground-disturbing activity that injures their environmental interests. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564-65 & n.2 (1992) (emphasis in original). Plaintiffs are not "immediately in danger of sustaining some direct injury as a result of the challenged" action. *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). While a forest plan creates a risk of "future injury contingent" on the later analysis and approval of a timber sale in an area where Plaintiffs' members recreate, such a contingent risk of injury does "not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Constitutional and prudential ripeness principles suggest that judicial review not occur in the factual vacuum of a facial challenge to a forest plan. There, it is not certain how a forest plan will be implemented, and the plan can be misconstrued (as we believe the Sixth Circuit misconstrued the Plan at issue here). The NFMA does not provide for judicial review at the abstract level of a forest plan. Review normally should wait until the "scope of the controversy 'has been reduced to more

manageable proportions, and its factual components fleshed out, by some concrete action.'"[5]

Bennett v. Spear, 117 S. Ct. 1154 (1997), does not alter this analysis. *Bennett*'s discussion of Art. III standing repeated the *Defenders of Wildlife* requirements for a "concrete" and "imminent" injury-in-fact. *Id.* at 1163. While the *Bennett* Court found that an Art. III injury could be fairly traced to the challenged biological opinion since it "alters the legal regime" by providing an immediately effective "permit authorizing the action agency to 'take' the endangered" species, the aspects of the forest plan challenged here lack such imminent and self-implementing effects. *Id.* at 1165; *see* pages 3-4, above. Additionally, *Bennett*'s conclusions on the factual presumptions that apply at the pleading or motion to dismiss stage have no bearing on the legal standing issues at summary judgment presented by this Petition. *Id.* at 1164. And, if *Bennett* does create legal uncertainty, this provides another reason to grant the Petition and clarify the law in this case.

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[5] *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990); *accord Renne v. Geary*, 501 U.S. 312, 320-23 (1991); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-75 (1982); *Wilderness Soc'y*, 83 F.3d at 390-91. Here, Plaintiffs' key complaints were that the Forest Plan designated 70% of the Wayne National Forest as being suitable for timber production, *see* 36 C.F.R. 219.14, and disclosed that some of the timber sales would be below-cost. *See* App. G. As the inclusion of lands in the suitable land base does not dictate that any timber sales occur on any of those lands, the designation on paper in the Forest Plan may not cause environmental injury-in-fact. Plaintiffs could raise more focused legal claims if a below-cost timber sale is proposed in an area which Plaintiffs believe must be preserved for primitive recreation.

4. Settling the justiciability issue at this time is of utmost importance. The Court's opinion would provide an answer shortly before the next generation of forest plans is litigated.

Forest plans last for 10 to 15 years, after which they are superseded by revised forest plans. *See* page 3, above. Most of the first generation of forest plans required by the NFMA were adopted from 1982 to 1988. The revision process has begun or will begin shortly on many of these forest plans. Over the next five years, 81 revised forest plans are scheduled to be released.

If the past is prologue, many (if not most) of the revised forest plans will be challenged in court. This Court's ruling here would provide guidance on whether facial challenges to forest plans are justiciable, or whether judicial review should await the more concrete setting of a forest plan "as applied" and implemented through a particular ground-disturbing action.

Accordingly, determining the justiciability issue in this case would be timely, both to resolve a well-developed split among five circuits and to provide direction on judicial review of the next generation of forest plans.

II. If Jurisdiction Exists, Review Should Extend To Three Significant Merits Rulings Which Also Involve Circuit Splits Or Constitutional Limitations

As described above, Petitioner is of the view that the Petition should be granted and this Court should reverse on jurisdictional grounds. But, if jurisdiction is found to exist, the Court should reverse on the merits. At this stage, the writ of certiorari should extend to the questions presented on the merits. Three merits issues deserve scrutiny because they present constitutional issues and circuit conflicts on issues of fundamental importance for the National Forest System.

A. The Forest Service Bias Ruling

1. The court below held the Forest Service is biased in favor of timber production. App. 5a-8a. The panel apparently used the bias conclusion to negate the "presumption of good faith and regularity" usually associated with agency decisions and, thus, to diminish the deference paid to the Forest Service's judgments. *Id.* Judge Batchelder wrote separately to disassociate herself from the "majority's largely undocumented broadside against the Forest Service." App. 9a.

2. Three of the four bias rationales offered by the court below are of an institutional nature that would infect all Forest Service decisions. One rationale was that, because 16 U.S.C. 475 refers to "ensur[ing] a reliable timber supply, the Forest Service has a history of preferring timber production to other uses." App. 7a. The second rationale was that, because 16 U.S.C. 500 directs "sharing of timber proceeds with the communities" surrounding a national forest, "the Forest Service becomes trapped" to issue timber sales as "[r]ural constituencies may provoke politicians to place pressure on the Forest Service to sustain that revenue." *Id.* The third rationale was that the "Forest Service budgeting process, which allows the Forest Service to keep a percentage of the funds it realizes from timber sales [pursuant to 16 U.S.C. 576-576d], provides an incentive for the Forest Service to sell timber below cost or at a loss." *Id.* In effect, the court below held that an *agency's adherence to Acts of Congress constitutes judicially remediable bias*. This remarkable holding deserves review by this Court for several reasons.

a. Any suggestion of unlawful bias in favor of timber production makes no sense in light of *United States v. New Mexico*, 438 U.S. 696 (1978). There, the Court held that the primary purposes of the National Forest System are to

"conserve the water flows, and to furnish a continuous supply of timber" -- the "*secondary* purposes" of "recreation, range, and 'fish'" protection are "'to be supplemental to, but not in derogation of'" the primary purposes. 438 U.S. at 707, 714-15, *quoting* 16 U.S.C. 528. Since Congress *intended* that national forests be managed for timber production, the Forest Service does not act unlawfully when it follows the congressional ordering of multiple use priorities.[6]

b. The court below's view that the Forest Service's adherence to statutes constitutes judicially remediable bias shows disrespect for two co-equal branches of government and presents significant *constitutional* issues.

A fundamental aspect of the separation of powers is that, when an agency states its reasoning in writing, a court can only review that reasoning during the record review allowed by 5 U.S.C. 706. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1986); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 41-43 (1983). If a court can find that a statutory framework renders an agency institutionally biased and that this allows a court to disregard the agency's stated reasoning, this would undermine basic respect for coordinate branches of government. That

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[6] There is a "presumption to which administrative agencies are entitled - that they will act properly and according to law." *FCC v. Schreiber*, 381 U.S. 279, 286 (1965). This presumption continues to apply when the Forest Service disburses revenues as provided by statute. And, since the NFMA and MUSYA delegate to the Forest Service (and not to the courts) the responsibility for making trade-offs among often-conflicting multiple uses, the panel erred in imposing its preference for the "recreational value of wilderness" on the expert agency and the public. App. 6a; *see* page 22, below.

extraordinary proposition warrants this Court's careful scrutiny.

The separation of powers prevents courts from becoming "continuing monitors of the wisdom and soundness of Executive action," as the court below has done in questioning the wisdom of timber production. *Laird v. Tatum*, 408 U.S. 1, 15 (1972).[7] Courts cannot engage in correction of agency action absent a constitutional or statutory violation, which is missing in the bias charge of the court below. *See Defenders of Wildlife*, 504 U.S. at 576-77; *Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-48, 556-58 (1978).

Further, a court cannot override *congressional* direction on the management of public lands without violating the Property Clause (Art. IV, § 3).

> The power of the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." [*Light v. United States*, 220 U.S. 523, 537 (1911).] Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy.

United States v. San Francisco, 310 U.S. 16, 29-30 (1940); *see Kleppe v. New Mexico*, 426 U.S. 529 (1976).

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[7] To illustrate why courts should not become monitors, development interests could use the logic of the court below to argue that the National Park Service is unlawfully biased in favor of preservation due to the conservation mandate for national parks in 16 U.S.C. 1 and to the agency's retention of visitor use fees.

c. The Court should undertake supervisory review because the precedents created by the court below unfairly impugn the integrity of an entire agency and compromise the agency's mission. The Sixth Circuit's decision now provides a credible basis for enjoining virtually any Forest Service land use planning decision that could be construed as favoring timber production or any decision authorizing a timber sale. According to the court below, the institutional "biases undermine[] even the facial neutrality of the National Forest Management Act" so as to render such decisions unlawful. App. 8a.

3. The Court also should review the Wayne National Forest "example of bias" that Wayne planners "arbitrarily undervalu[ed] the recreational value of wilderness." App. 6a. This bias claim is factually disproven by the administrative record (which the court below declined to even cite, contrary to 5 U.S.C. 706), and the claim lacks legal support.[8]

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[8] The Draft and Final EISs analyzed seven alternative forest plans. Alternative 7 emphasized primitive recreation, and alternatives 3 and 4 emphasized dispersed recreation and uneven-aged management. *See* Draft EIS at vi-ix and Chapter 2; JA 528-71; App. 38a-40a. The selected Plan provides natural and primitive recreation on over half of the then-177,701 acre national forest. *See* Wayne Forest Plan at 4-63 to 181 (describing Management Areas 2.1, 2.2, 6.1, 6.2, 6.3, and 8.1 (comprising 42,201 acres); primitive recreation can occur on a portion the 57,736 acre MA 3.3 as well). Thus, no bias against primitive recreation is apparent in the scope of alternatives considered, or in the selected Plan.

If the court below was second-guessing the dollar values the Forest Service assigned to unpriced commodities (primitive or dispersed recreation and developed recreation), it should have deferred to the agency's expert opinion on this disputed technical

(continued...)

B. The Two NFMA Rulings

1. The court below reached two interpretations of the NFMA, and of 16 U.S.C. 1604(g)(3)(F)(v) in particular, which create conflicts in the circuits and which would fundamentally alter the management of national forests.

2. The panel interpreted the NFMA to be a stringent constraint on the timber harvesting techniques (clearcutting, seed-tree cutting, and shelterwood cutting) that produce an even-aged tree stand. "[E]ven-aged management techniques will be used only in exceptional circumstances" -- the techniques must be the "exception," rather than the "rule." App. 6a. The Court should review this NFMA interpretation for the following reasons.

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[8](...continued)
issue. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989); *see Mumma*, 956 F.2d at 1522 ("we are not in a position to prefer ICL's view of the FS's software over the" economic inputs employed by the Forest Service); *Thomas v. Peterson*, 753 F.2d 754, 762 (9th Cir. 1985); App. 41a-42a (other dismissals of recreational value issues). Further, since a higher dollar value was assigned to primitive or dispersed recreation than to developed recreation, *see* Draft EIS at B4-13, JA 690, this undercuts the claim that the values were biased. Most importantly, the dollar value debate seems to be harmless error, not "prejudicial error," because it did not affect the final decision. 5 U.S.C. 706. The alternative chosen as the Wayne Forest Plan did not have the highest present net value and, instead, was structured to provide greater primitive recreation. *See* Final EIS at 2-8 and Record of Decision at 28-29; JA 824 and 972-73; 123a-124a. And, if the panel's real objection was to "below-cost sales" (App. 7a), the legal answer is that the NFMA permits below-cost timber sales and does not require profit maximization. *See* 16 U.S.C. 1604(g)(3)(E)(iv) and (k); *Resources Ltd.*, 789 F. Supp. at 1538; *Citizens for Envtl. Quality v. United States*, 731 F. Supp. 970, 988 (D. Colo. 1989); App. 30a-37a, 68a-69a.

a. The panel's view conflicts directly with *Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994). The Fifth Circuit there held the "NFMA does not bar even-aged management or require that it be undertaken only in exceptional circumstances." 38 F.3d at 800.[9] The panel's view that even-aged management may be employed only in "exceptional circumstances" also conflicts with the Ninth Circuit's conclusion that the NFMA and NEPA were not violated when "no Plan alternative allocates less than 75% of harvest to even-aged cutting" and with other decisions and statutes.[10]

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[9] The Sixth Circuit's views on "exceptional circumstances," on preservation of natural values, and on Forest Service bias (and even much of the language employed in the opinion) are the same views a district court expressed in the Texas National Forest case, *Sierra Club v. Espy*, 822 F. Supp. 356, 361-65 (E.D. Tex. 1993). However, the Fifth Circuit reversed in an opinion which explains why the Forest Service has considerable land management discretion under the NFMA. 38 F.3d 792. The Sixth Circuit essentially adopted, *sub silentio*, the Texas district court's discredited views without mentioning the Fifth Circuit's opinion or rebutting its logic.

[10] *E.g., Resources Ltd.*, 35 F.3d at 1307, *aff'g*, 789 F. Supp. at 1538; *see also Sierra Club v. Robertson*, 784 F. Supp. 593, 611 (W.D. Ark. 1991) (a court cannot "substitute its discretion for that of the Forest Service in order to halt even-aged management"), *aff'd*, 28 F.3d 753, 757 (8th Cir. 1994). The Fifth Circuit has found that the NFMA, instead of largely prohibiting even-aged management, represents a "congressional decision to permit clearcutting in national forests." *Texas Comm. on Natural Resources v. Bergland*, 573 F.2d 201, 210 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978).

For several years, appropriations acts have limited "clearcutting in hardwood stands in the Wayne National Forest" to "25 percent of the fiscal year 1989 harvested volume." *E.g.*, FY 1997 Omnibus Appropriations Act, 110 Stat. 3009-208 (1996). This suggests that

(continued...)

b. This circuit conflict concerns a "fundamental issue of forest management." Lazarus, THE ENVTL. FORUM, March/April 1997, at 10. There are two basic systems for the silvicultural management of a stand of trees. One is the even-aged management system, where most trees are of the same age-class, though normally not the same species.[11] The other is uneven-aged management, where trees are of different age-classes. *See* 36 C.F.R. 219.3.

If even-aged management is allowed only in "exceptional circumstances," the Forest Service would be largely precluded from employing one of the two principal forms of scientific forest management. As the district court adverted to, allowing only uneven-aged management "would result in its own form of monoculture: a dark high-canopy forest in which only shade tolerant species can survive." App. 24a. Thus, the Court should grant the Petition because a general ban on even-aged

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[10](...continued)
Congress did not so limit clearcutting in the NFMA. Forest Service statistics show that less than 1500 acres of the 177,701-acre Wayne National Forest have been clearcut since 1988. Thus, the court below misconstrued the Wayne Forest Plan in concluding that it caused widespread clearcutting. This illustrates why judicial review should not be conducted at the generalized level of a forest plan.

[11] Even-aged stands of trees are created naturally by fires, windstorms, and pest infestations. Humans replicate even-aged stands through timber harvesting techniques that cut most of the timber in one or two cycles. 16 U.S.C. 1604(g)(3)(F). Some valuable tree species are shade-intolerant (they grow best in the sunny conditions after even-aged cuts), and some wildlife species depend on the browse habitats in young even-aged stands. *See Sierra Club v. Espy*, 38 F.3d at 802; *Resources Ltd.*, 35 F.3d at 1307; *Sierra Club v. Robertson*, 784 F. Supp. at 608-09; App. 6a (private even-aged timber stands provide "an abundance of diverse plant and animal life").

management has profound implications for the 188 million-acre National Forest System.

3. The court below also ruled that NFMA creates a strong "protective spirit" for the "recreational value of wilderness" and found that the Wayne Forest Plan is "in excess of the statutory limitations provided in § 1604(g)(3)(F)(v)." App. 6a, 8a. The Sixth Circuit seemed to reason that the NFMA requires the preservation of primitive recreational values first, and that timber harvesting is secondary.

a. This view of the priorities among multiple uses inverts the priorities discussed in *United States v. New Mexico*, 438 U.S. at 708-15. *See* pages 14-15, above.

b. Additionally, this aspect of the opinion below warrants review because it creates conflicts with circuit court opinions in several areas. The Fifth Circuit held that § 1604(g)(3)(F)(v) "does not mandate status quo protection" of recreational or biotic resources -- "protection means something less than preservation of the status quo" and the appropriate level of protection is a "policy-oriented decision Congress wisely left to the discretion of the experts - here the Forest Service." *Sierra Club v. Espy*, 38 F.3d at 800.[12]

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[12] "[N]ational forests, unlike the national parks, are not wholly dedicated to recreational and environmental values." *Cronin v. United States Dep't of Agric.*, 919 F.2d 439, 448 (7th Cir. 1990). "So long as Congress requires this Forest to be managed with multiple-use principles, portions of the Forest must embody a compromise between 'natural' Forest conditions and the need for Forest resources" like timber. *Krichbaum v. Kelley*, 844 F. Supp. 1107, 1119 (W.D. Va. 1994), *aff'd*, 61 F.3d 900 (4th Cir. 1995); *see Citizens for Envtl. Quality*, 731 F. Supp. at 984.

Other appellate courts have found the Forest Service is the agency "charged with managing the ever-changing resources of the national forests" and that a court should "defer to the agency's determination" of the appropriate "trade-offs" among conflicting multiple uses.[13] In this important sense, the Sixth Circuit's notion that it could freely override the expert agency's decision on the desired mix of multiple uses is inconsistent with the deferential review of an agency's interpretation of a statute it administers in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), and its progeny -- and with the deferential review of an agency's policy decisions under cases like *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2418 (1995).

c. Allowing a court to substitute its preference for wilderness-type management of national forests has broad significance. It compromises the Forest Service's land use discretion under MUSYA and the NFMA.[14] It compromises

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[13] *Sierra Club v. Espy*, 38 F.3d at 801-02; *see Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979) (Forest Service land allocation decisions "breathe discretion at every pore"); *Big Hole Ranchers Ass'n, Inc. v. United States Forest Serv.*, 686 F. Supp. 256, 264 (D. Mont. 1988) ("the Forest Service has wide discretion to weigh and decide the proper uses within each area").

[14] The opinion below is binding within the Sixth Circuit. Since rehearing *en banc* has been denied, there are no prospects for relief in that court. The opinion below constrains management of millions of acres within the Daniel Boone National Forest in Kentucky; the Hiawatha, Huron-Manistee, and Ottawa National Forests in Michigan; the Wayne National Forest in Ohio; and the Cherokee National Forest in Tennessee. *See* 36 C.F.R. 200.2. The holdings on Forest Service institutional bias and on the NFMA provide credible grounds to (continued...)

the timber production purpose that 16 U.S.C. 475 sets for the National Forest System, thereby reducing the domestic timber supply and causing economic injuries to consumers of forest products and to forest product companies and their employees. Since there are reasons to believe that this judicially-imposed shift in land management philosophy is legally unauthorized, the Court's discretionary review is warranted.

4. As the above-cited cases indicate, the NFMA is a frequent source of litigation. The Court's guidance on the two NFMA issues would bring desirable uniformity and certainty to this area of law.

5. Finally, the Court should entertain review of the NFMA issues to ensure that Congress's *real* intent is not side-tracked. As Senator Hubert Humphrey stated in describing the NFMA conference report, the NFMA "is designed to get the practice of forestry out of the courts and back to the forests." 122 Cong. Rec. 33835 (Sept. 30, 1976).

The Court can fulfill that intent by granting the Petition and finding that this facial challenge to a forest plan presents no justiciable controversy for the courts. Alternatively, the Court could find, on the merits, that the significant constraints imposed on national forest management by the decision below are not authorized by the NFMA or by charges of bias.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[14](...continued)
require additional forest planning in all these national forests, and to enjoin timber sales. Outside the Sixth Circuit, the opinion below may influence other courts to reach similar conclusions.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 94-3407

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SIERRA CLUB, *et al.*,
Plaintiffs-Appellants,

v.

JACK WARD THOMAS, *et al.*,
Defendants-Appellees,

OHIO FORESTRY ASSOCIATION, INC.,
Intervening Defendant-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed January 21, 1997

Before: MARTIN, Chief Judge; BATCHELDER, Circuit Judge; COOK, District Judge.*

MARTIN, C. J., delivered the opinion of the court, in which COOK, D. J., joined. BATCHELDER, J. (p. 8), delivered a separate concurring opinion.

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* The Honorable Julian A. Cook, United States District Judge for the Southern District of Michigan, sitting by designation.

BOYCE F. MARTIN, JR., Chief Judge. The Sierra Club and Citizens Council on Conservation and Environmental Control appeal the district court's order granting summary judgment to Jack Ward Thomas, Chief of the United States Forest Service, and officials of the United States Forest Service, pursuant to the district court's review of the Land Resource Management Plan for the Wayne National Forest. For the reasons described below, we reverse and remand this matter to the district court for further proceedings consistent with this opinion.

In 1988, the regional forester for the Eastern Division of the United States Forest Service issued a decision, pursuant to the National Forest Management Act, adopting a ten-year plan for Ohio's Wayne National Forest. The plan designated 126,107 acres of the Wayne from which timber could be removed or cut. During the ten-year life of the plan, 7.5 million board feet of timber could be cut per year. The plan designated that eighty percent of all timbering techniques would be "even-aged management", a harvest technique aimed at creating a regeneration of trees which are essentially the same age. In almost all cases, the even-aged management contemplated clearcutting of the timber. Clearcutting involves the removal of all trees within areas ranging in size from fifteen to thirty acres, and is thus a very sensitive public issue.

The Sierra Club appealed the regional forester's decision to the chief of the Forest Service pursuant to the applicable regulations. In 1990, the chief of the Forest Service denied the Sierra Club's appeal and affirmed the plan. Pursuant to final agency action, the Sierra Club filed this action in the district court. Appealing the district court's order granting

summary judgment to the Forest Service, the Sierra Club argues that the Forest Service made arbitrary assumptions in the Wayne planning process that biased the plan toward timbering.

The National Forest Management Act was enacted as a direct result of congressional concern for Forest Service clearcutting practices and the dominant role timber production has historically played in Forest Service policies. Congress was concerned that, if left to its own essentially unbridled devices, the Forest Service would manage the national forests as mere monocultural "tree farms." Procedurally, the Act requires the Forest Service to develop Land and Resource Management Plans for the national forests. This formal planning process was designed to curtail agency discretion and to ensure forest preservation and productivity. Substantively, the Act Imposes extensive limitations on timber harvesting by restricting the use of clearcutting to situations in which clearcutting is the optimum method for harvesting.

First, we address the threshold issue of justiciability. The Forest Service claims that the Sierra Club lacks standing. To establish constitutional standing, a plaintiff first must first suffer an injury-in-fact that is (1) concrete and particularized, and (2) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, the injury must be fairly traceable to the defendant's conduct. *Id.* at 560-61. Third, the injury must be redressable by the court. *Id.* at 561. In cases involving Land Resource Management Plans, the most controverted standing issue is whether the injury is imminent.

A plaintiff who seeks review of a Land Resource Management Plan must show that it will suffer personal harm as a result of the plan. We have long recognized that injury is not confined to economic injury; aesthetic and environmental injuries can be embraced by this definition of personal harm. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). Land Resource Management Plans represent significant and concrete decisions that play a critical role in future Forest Service actions. "To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992). If the Sierra Club was allowed to challenge the Forest Service plan only at the site-specific stage, then the meaningful citizen participation contemplated by the National Forest Management Act "would forever escape review." *Id.*

The district court concluded that the Sierra Club's challenge presented a ripe controversy. Closely related to the issue of standing, the ripeness doctrine exists to keep the judiciary from "entangling [itself] in abstract disagreements over administrative policies" by preventing premature adjudication. *Sierra Club v. Marita*, 46 F.3d 606, 614 (7th Cir. 1995)(quoting *Abbot Lab v. Gardner*, 387 U.S. 136, 148-49 (1967)). The Forest Service maintains that disputes over forest planning are not ripe for review until a site-specific action occurs. We agree with the district court. Plaintiffs need not wait to challenge a specific project when their grievance is with an overall plan.

Because we find that the Sierra Club's case is justiciable, we turn now to the merits. We give no particular deference to the

district court and directly review the administrative record as if we were the first reviewing court. *Schuck v. Frank*, 27 F.3d 194, 197 (6th Cir. 1994). While it is generally accepted that federal agencies are entitled to a presumption of good faith and regularity in arriving at their decisions, that presumption is not irrebuttable. We would be abdicating our Constitutional role were we simply to "rubber stamp" this complex agency decision rather than ensuring that such decision is in accord with clear congressional mandates. It is our role to see that important legislative purposes are not lost or misdirected in the vast hallways of the federal bureaucracy. Specifically, we must decide whether the Forest Service took a hard look at the relevant factors and reached a decision that was neither arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

The Sierra Club contends that the even-aged logging agenda is illegal in that the Forest Service has not complied with the constraints on its choice of even-aged management techniques contained in the National Forest Management Act. In reviewing this record, we have carefully examined the conclusions drawn by the Forest Service to test for internal consistency and reasonableness. Although the Forest Service has the benefit of the presumption of good faith and regularity in agency action, we have attempted to ascertain whether the plan has been improperly skewed. We conclude that the planning process was improperly predisposed toward clearcutting. The resulting plan is arbitrary and capricious because it is based upon this artificial narrowing of options.

Although it would be impractical to set forth the details of the administrative record here, one example of bias is

particularly illustrative. The Forest Service argues that its even-aged management plan is based on evidence that timbering will provide new opportunities for recreation that will, in turn, preserve and enhance the diversity of plant and animal communities in the Wayne National Forest. Most recreation does not require timber harvesting, however. Further, as the Forest Service's own records reflect, the Wayne is surrounded by and intermingled with privately-held land which already contains an abundance of diverse plant and animal life. Timbering simply does not promote the kind of recreational activities that are in demand in the Wayne; in fact, recreation like fishing and hiking is harmed by clearcutting. The planners also failed to recognize that cutting is unlikely to stimulate new and valuable forms of recreation because much of the Wayne has already been cut or developed. In that particular environment, clearcutting loses its value.

The National Forest Management Act mandates that the Service ensure that even-aged management practices be used in the national forests only when "consistent with the protection of soil, watershed, fish, wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource." 16 U.S.C. § 1604(g)(3)(F)(v). The National Forest Management Act thus contemplates that even-aged management techniques will be used only in exceptional circumstances. Yet, the defendants would utilize even-aged management logging as if it were the statutory rule, rather than the exception. By arbitrarily undervaluing the recreational value of wilderness, the Forest Service created a very distorted picture of the Wayne National Forest. Based on false premises such as these, the Forest Service improperly concluded that clearcutting was necessary.

It is not surprising that the Forest Service came to this conclusion. Created, in part, to ensure a reliable timber supply, the Forest Service has a history of preferring timber production to other uses. Rather than being a neutral process which determines how the national forests can best meet the needs of the American people, forest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse. Because national forests are located near rural communities, foresters make management decisions to support perceived needs in the communities. By sharing timber proceeds with those communities, the Forest Service strengthens the link between timber sales and the livelihoods of local constituencies. *See*, Office of Technology Assessment, *Forest Service Planning: Accommodating Uses, Producing Outputs, and Sustaining Ecosystems* 46 (1992). The resulting dependency of these communities on timber production causes over-harvesting and destructive harvesting methods. The relationship of the Forest Service to the timber industry also constrains the Forest Service's planning freedom. Rural constituencies reliant on timber sale revenues may provoke politicians to place pressure on the Forest Service to sustain that revenue. Consequently, the Forest Service becomes trapped: cutting off timber sales would cause loss of employment and revenue in local communities but continued timber sales risk over-harvesting and below-cost sales.

The Forest Service budgeting process, which allows the Forest Service to keep a percentage of the funds it realizes from timber sales, provides an incentive for the Forest Service to sell timber below cost or at a loss. *See,* Randal O'Toole, *Reforming the Forest Service* 122 (1988). Also, to maximize

its budget, the Forest Service uses expensive timber management and reforestation techniques, such as clearcutting. *Id.* Again, conflicting interests lead to perverse results: clearcutting provides the Forest Service with a higher congressional subsidy because the Forest Service can request preparation and administrative costs. Consequently, decisions may be made, not because they are in the best interest of the American people but because they benefit the Forest Service's fiscal interest.

Each of these biases undermines even the facial neutrality of the National Forest Management Act. Even when there may be more valuable uses for the land, the above biases and constraints cause the Forest Service to manage primarily to maximize timber outputs.

The public nature of the planning process and the public's right to appeal timber sales were intended by Congress to be a check on the Forest Service's power and discretion. Judicial review of planning decisions is intended to be a further check. Accordingly, in light of our examination of the structure, legislative history, and purpose of the National Forest Management Act we find the Forest Service has failed to comply with the protective spirit of the National Forest Management Act. We further find that this non-compliance is an arbitrary act in excess of the statutory limitations provided in § 1604(g)(3)(F)(v). The Forest Service's planning process, therefore, was not in accordance with the law. Accordingly, we REVERSE the district court's order for summary judgment and REMAND this case to the district court for further proceedings consistent with this opinion.

ALICE M. BATCHELDER, Circuit Judge, concurring. I concur in this decision because I believe that the reasoning of the Seventh Circuit in *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995) is the better approach to the issues of standing and ripeness in this matter,[1] and because I agree that the record before us supports a conclusion that the Forest Service has not complied with the mandates of the National Forest Service Management Act relative to even-aged management practices in adopting the Plan. I write separately because, while I, too, have serious questions and concerns about the management practices and policies of the Forest Service, I do not believe that the majority's largely undocumented broadside against the Forest Service is appropriate. The issue before us is simply whether the Plan was properly promulgated within the appropriate exercise of the agency's discretion and is therefore within the law. We conclude that it is not. Our speculation about the motives and biases of the Forest Service, even if accurate, is unnecessary, and therefore, ought not to be voiced in this opinion.

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[1] The Seventh Circuit's reasoning in concluding that the Sierra Club had standing and that the controversy was ripe for adjudication is essentially summed up by the court's conclusion that "[t]he Sierra Club is appealing the issuance of a final management plan which will, unless amended, direct Service management activities in [the national forests at issue.] ... The Sierra Club 'need not wait to challenge a specific project when their grievance is with an overall plan.'" *Marita*, 46 F.3d at 614 (citation omitted).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Sierra Club, et al., [Filed March 11, 1994]
Plaintiffs,

vs. Case No. C2-92-249
JUDGE GRAHAM

F. Dale Robertson, et al.,
Defendants.

OPINION AND ORDER

The Sierra Club and Citizens Council on Conservation and Environmental Control ("Citizens Council"), plaintiffs herein, filed this action against Mike Espy, Secretary of Agriculture, and officials of the United States Forest Service.

Plaintiffs challenge the Land and Resource Management Plan ("the Plan") for the Wayne National Forest ("the Wayne") and the Final Environmental Impact Statement ("FEIS") for the Plan, alleging violations of the National Forest Management Act ("NFMA"), 16 U.S.C. § 1601-1614, the Multiple-Use Sustained Yield Act ("MUSYA"), 16 U.S.C. § 528 et seq., and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. This action is brought under the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. This matter is now before the Court on the parties' cross-motions for summary judgment.

STANDARD OF REVIEW

Review of final agency action under NEPA and NFMA is governed by the APA, which directs a reviewing court to affirm final agency action unless that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). The ultimate standard of review is a narrow one, and the court is not empowered to substitute its judgment for that of the agency, but instead it is to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. at 416.

While the agency's decisions are entitled to a presumption of regularity, that presumption does not shield them from a thorough, probing review. Druid Hills Civic Ass'n v. Federal Highway Administration, 772 F.2d 700, 714 (11th Cir. 1985). In reviewing NEPA compliance, the role of the court is to ensure that the agency has adequately considered and disclosed the environmental impacts of its actions and that its decision is not arbitrary or capricious. Communities, Inc. v. Busey, 956 F.2d 619, 623 (6th Cir. 1992) (quoting Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97-98 (1983)). Where a statute is ambiguous, review is limited to determining whether the agency's interpretation is based on a permissible construction of the statute, and does not extend to matters of policy. Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984). An agency's interpretation of its own regulations is binding on the court "unless it is plainly erroneous or inconsistent with the regulation." United States v. Larionoff, 431 U.S. 864, 872 (1977). Within the parameters of the applicable statutes and regulations, the management decision belongs to the agency, and should not be

second-guessed by a court. Texas Committee on Natural Resources v. Bergland, 573 F.2d 201, 210 (5th Cir.), cert. denied, 439 U.S. 966 (1978).

BACKGROUND

The Wayne National Forest is located in the unglaciated Appalachian Plateau of southeastern Ohio, commonly referred to as Ohio's Hill Country. It is bordered on the south by the Ohio River and includes three noncontiguous units located in the counties of Athens, Gallia, Hocking, Jackson, Lawrence, Monroe, Morgan, Perry, Scioto, Vinton and Washington. The gross area within the forest purchase units is 832,147 acres, of which 21% or 177,701 acres are now actually owned by the National Forest Service. There are many tracts of privately owned land intermingled with the Forest Service lands.

The management of the national forests is entrusted to the United States Department of Agriculture Forest Service. The NFMA requires the Forest Service to develop long-term plans for the management of national forests. Under NFMA and its regulations, the development of a forest management plan proceeds through a series of steps which ensure public involvement at each stage of the planning process. See 36 C.F.R. § 219.6, § 219.10, § 219.12. The first step is to identify the issues that the plan should address. Once that assessment is completed, several alternative management plans are constructed and each is subjected to an analysis of costs, benefits and environmental impacts, in accordance with NFMA and NEPA. After reviewing the environmental impacts and the cost benefit analysis, the Regional Forester for the administrative region in which the forest is located selects the alternative that in his opinion will "provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public

benefits in an environmentally sound manner." 36 C.F.R. § 219.1(a). The approved plan controls all activity within the forest for a ten-year to fifteen-year period.

The planning process for the Wayne began in 1981 and continued over a period of five years. In August, 1986, the Forest Service published the proposed Plan together with a draft environmental impact statement ("DEIS") and distributed them to the public for comment. On January 4, 1988, after analyzing over 1,500 written comments, the Forest Service adopted the final Plan accompanied by a record of decision ("ROD") and the FEIS.

Both plaintiffs participated extensively in the initial planning process and in the comment period following publication of the proposed Plan and the DEIS. Both plaintiffs appealed the decision to adopt the Plan. The Chief of the Forest Service issued decisions on November 14, 1990 and January 14, 1992 denying plaintiffs' appeals. Plaintiffs filed this action on March 18, 1992.

SELECTION OF SILVICULTURAL SYSTEMS AND TIMBER HARVEST METHODS

Under the Organic Act of 1897, a national forest may be established and administered only "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. § 475. In 1960, Congress enacted the MUSYA, which directed the Secretary of Agriculture to develop and administer the resources of the national forests "for multiple use and sustained yield of the several products and services obtained therefrom" including "recreation, range, timber, watershed and wildlife and fish"

with due consideration "to the relative values of the various resources" and in such a way that the "periodic output" of such resources be maintained "in perpetuity...without impairment of the productivity of the land." 16 U.S.C. §§ 528, 529, 531. The principles of the MUSYA were expressly incorporated into the statutory and regulatory scheme of the NFMA. Under 16 U.S.C. § 1604(e)(1), the Secretary, in developing plans for the National Forest System, must assure that they

> provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960...and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; ....

Inasmuch as one of plaintiffs' major objections to the Plan is its provision for timbering, it is appropriate to note that the harvesting of timber is and always has been one of the purposes of the National Forest System. The record of this case indicates that the harvesting of timber is also an important forest management tool.

Silviculture is that phase of forestry that deals with the establishment, development, reproduction and care of forest trees. Webster's Third New International Dictionary Unabridged, 1981. A silvicultural system is a management process whereby forests are tended, harvested, and replaced, resulting in a forest of distinctive form. 36 C.F.R. § 219.3. Systems are classified according to the method of carrying out the fellings that remove the mature crop and provide for regeneration, and according to the type of forest thereby produced. Id. In managing forest lands, there are two systems available: even-aged and uneven-aged. Plan,

Appendix, p. C-1. Even-aged management results in the creation of stands in which trees of essentially the same age grow together. DEIS, Appendix, p. E-7. Uneven-aged management seeks to maintain the growth of trees through a range of diameter or age classes. Id., p. E-28.

Within the even-aged system, there are three recognized harvest methods: clearcutting, shelterwood and seed tree. Plan, Appendix, p. C-1. With even-aged harvest methods, the intent is to maintain a mosaic of different-aged stands of manageable size of equal age. Id., p. C-3. The seed tree method involves harvesting all but a few well-distributed trees of the desired species to provide seed for natural regeneration. Id., p. C-4. Later, the seed trees themselves are harvested. In the shelterwood method, all trees are removed in a series of two or three cuts with the final cut being made after a sufficient amount of desirable reproduction has become established. Id. This method provides a partial cover which may benefit the growth of seedlings. The clearcut method involves the cutting of all trees, merchantable and unmerchantable, at one time. Regeneration develops from natural seeding and sprouting. Id.

Within the uneven-aged system, the harvest method is selection, either single-tree or group selection. Plan, Appendix, p. C-1. Single-tree selection entails the periodic removal of individual trees. Id., p. C-2. In the group selection method, group cuts, resembling small clear cuts, are made in a checkerboard pattern creating many small openings of one-half to two acres within the forest. Id., p. C-3.

Each silvicultural system and its respective harvest methods have advantages and disadvantages.[1] The selection of the appropriate system and harvest method depends upon the judgment of the forest planner, taking into consideration the circumstances of the forest or subparts thereof, the goals of the forest plan and all applicable statutory and regulatory mandates. Clearcutting may be chosen as the method to regenerate an even-aged stand of timber only where it is the "optimum method," and other cuts may be used if "appropriate, to meet the objectives and requirements of the relevant land management plan." 16 U.S.C. § 1604(g)(3)(F). Timber harvests must be "carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation and esthetic resources, and the regeneration of the timber resource." 16 U.S.C. § 1604(g)(3)(F)(v).

The Plan divides the Wayne into fifteen management areas, each of which has a management prescription. A management prescription consists of management practices selected and scheduled for application on a specific area to attain multiple use and other goals and objectives. 36 C.F.R. § 219.3. Each management prescription specifies the silvicultural systems and harvest methods to be applied.

The Plan provides for even-aged management on 80% of the suitable forest land and for uneven-aged management on the remaining 20%. ROD, p. 18. The Plan projects, but does not require, that over the course of a decade, 5,075 acres will be harvested under even-aged management and 2,760 acres will be harvested under uneven-aged management. Plan, p. 4-

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[1] For discussion of pros and cons of even-aged versus uneven-aged management, see DEIS, pp. 4-16 to 4-32.

180. The predominant even-aged management harvest method is clearcutting. Plaintiffs argue that the Forest Service has illegally and arbitrarily adopted even-aged management as the routine method of vegetative management. They argue that the Plan fails to address the environmental impacts of clearcutting at specific locations and that it fails to address the requirement of optimality of clearcutting on a site-specific basis. They argue against clearcutting on the grounds that it has numerous detrimental environmental impacts, including the building of temporary roads and hauling logs which affect soils and plant life, and that it changes water run-off, causes erosion and otherwise adversely impacts water resources and soil stability. They argue that the role of slopes and soil condition are critical to assessing the effects of clearcutting. They note that the forest is dominated by narrow ridges and valleys with slopes ranging from 15% to 80% and argue that the slopes and soil conditions present in the forest are not compatible with clearcutting. They object to the Plan's failure to address required mitigation techniques on a site-specific basis and attack as arbitrary the Plan's determination that slopes of 55% or higher are not accessible for purposes of logging.

A review of the Plan, the DEIS and the FEIS shows that all of these concerns were addressed by the Forest Service and that the applicable statutes and regulations provide for a further assessment of these concerns on a site-specific basis when the Forest Service proposes to pursue specific projects in the forest.

Plaintiffs contend that the Plan should specify in detail the proposed use of each and every acre of the forest. This is not required by the NFMA or NEPA, and in any event, it would be a practical impossibility in view of the fact that a general land use plan required over six years to complete.

The Plan is programmatic in nature. It does not propose any specific development. Implementation of the Plan occurs at a second stage when individual site-specific projects are proposed and assessed. Idaho Conservation League v. Mumma, 956 F.2d 1508, 1512 (9th Cir. 1992). The Forest Supervisor must ensure that all projects are consistent with the Plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.11(e). Further NEPA analysis is required to evaluate the effects of a specific project and a range of alternative actions, including a "no action" alternative. 40 C.F.R. §§ 1502.14 (d), 1508.9 (b). In future environmental analyses, reference is made to the Plan, the FEIS and any subsequent environmental impact statements, a process known as "tiering." 40 C.F.R. § 1502.20. See Plan, p. 5-2. A detailed analysis of specific environmental impacts is not required when the agency has not yet proposed the specific project that may cause the impacts. Northern Alaska Environmental Center v. Lujan, 961 F.2d 886, 891 (9th Cir. 1992).

The Plan addresses the effects of timber harvesting on soil and water resources, the problem of slopes and roads and erosion mitigation techniques.

> Although not conducted specifically on the Wayne National Forest, research has repeatedly shown the effect of clearcutting on soil and water quality is normally within fully acceptable limits and may be less than would be associated with other methods of harvesting. The major potential for soil damage would be caused by improperly located log landings and logging roads. With appropriate mitigating measures as described in the standards and guidelines of the Forest Plan, pages 4-28 to 4-38, this will not be a major problem. Harvesting with well-

> planned, well-constructed, and well-maintained road systems will minimize soil erosion and channeling effect and will cause no real damage to water resources (Kochenderfer and Aubertin, 1975).

FEIS, p. 2-17. See also DEIS, pp. 3-2 to 3-3, 4-3 to 4-4, 4-49 to 4-50; DEIS, Appendix, p. B3-9. Plaintiffs have not shown that these general determinations are arbitrary or capricious. A more specific consideration of these matters is properly deferred until there is a proposal of a specific timber sale at a specific site.

The Plan provides for procedures to mitigate and prevent erosion and water pollution. See Plan, pp. 4-28 to 4-35. See also FEIS, p. 2-15 (discussing erosion and clearcutting). Plaintiffs criticize the Plan for not specifying when or at what specific location mitigation techniques are to be used and for failing to discuss the cost of mitigation techniques. However, the Plan contemplates that mitigation techniques will be addressed at the time of specific timber sales and that the costs of such techniques will be borne by the purchasers and enforced by the contract of sale. FEIS, p. 2-18. Thus, if the cost of mitigation renders a sale unprofitable presumably it will not occur and there is no need to address such costs in the Plan.

With regard to the selection of even-aged management and clearcutting as a harvest method, 16 U.S.C. § 1604(g)(3)(F)(i) requires the Secretary to promulgate regulations for the development of land management plans which must include guidelines which

> insure that clearcutting, seed tree cutting, and other cuts designed to regenerate an even-aged stand of timber will be used as a cutting method

> on National Forest System lands only where -- (i) for clearcutting, it is determined to be the optimum method, and for other such cuts it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan; ....

Pursuant to this statutory mandate, the Secretary has promulgated 36 C.F.R. § 219.27(b)(1), which requires that management prescriptions in a forest plan that include vegetative manipulation of tree cover for any purpose shall

> (1) Be best suited to the multiple-use goals established for the area with potential environmental, biological cultural resource, aesthetic, engineering, and economic impacts, as stated in the regional guides and forest plans, being considered in this determination; ....

As applied to clearcutting, the regulation requires that it be best suited to meet the requirements and objectives of the Plan. "Best suited" is synonymous with "optimal." Thus, the rule is consistent with the statute.

The Plan for the Wayne complies with the statute and the rule. In those management prescriptions which include clearcutting, there is a determination that clearcutting is the optimum method to meet the objectives and requirements of the Plan and the rationale for that determination is explained. See Plan, Appendix C. This determination will substantially affect future decisions and is ripe for review. Mumma, 956 F.2d at 1508. The reasons given for choosing clearcutting include the following:

> To obtain desirable natural regeneration in central hardwood-stands, clearcutting is the most effective method. Clearcutting normally

> results in more seedlings and new sprouts than any other harvest method. Where regeneration of oak and hickory is of primary importance, advance reproduction of these species is essential prior to harvesting the overstory. (Sander and Clark, 1971) Experience has also shown that other factors such as site quality, aspect and slope position affect the composition of natural regeneration. The oaks and hickories compete better on poor, dry sites with south and west exposure.
>
> Clearcutting is especially appropriate for stands where the residual trees would not be worth retaining for a future crop, when stands have had the best trees removed in past harvests, or in areas which have insufficient trees to adequately use growing space.
>
> * * *
>
> To maintain the present diversity of tree and animal species and high quality hardwoods on a sustained yield basis, it is necessary to use an even-aged system. The only methods applicable to the Forest are shelterwood and clearcut.
>
> The Eastern white pine plantations will be regenerated by the shelterwood method and will result in mixed pine-hardwood stands.
>
> Clearcutting is optimum to regenerate the yellow poplar type because it is the only method which provides sufficient light to achieve adequate stocking and growth of yellow poplar.
>
> The clearcut and shelterwood methods are both appropriate for the oak-hickory type. In stands

where the desired condition is the forest type and advance regeneration is not present in adequate numbers, shelterwood may be used in an attempt to increase the amount of desired advance regeneration. The use of shelterwood will probably be in conjunction with prescribed fire, understory control of undesired species, underplanting of oaks, or a combination of all these practices. Stands with a poorly stocked overstory or of low vigor are not shelterwood opportunities. These stands will be regenerated by clearcutting to retain oak and hickory as stand components.

Where oak-hickory regeneration is not a problem, clearcutting is optimum because: [7 specific reasons are given]

> In summary, where oak-hickory reproduction is not a problem, clearcutting is optimum. It offers more flexibility of location to manage timber for other purposes, higher revenues, lower costs, and less risk. In nearly all cases, clearcutting will regenerate as much, or more, oak than uneven-aged management by the group-selection method and more than would be regenerated using [a] single-tree selection method of management.

Plan, Appendix, pp. C-4 to C-7.

The FEIS further explains the rationale for choosing clearcutting in response to specific objections to the Plan's proposed vegetative management prescriptions. See FEIS, pp. 2-15 to 2-18 and 2-23.

> Many people believe that the long-term effects of clearcutting have not been adequately

> assessed. However, this harvesting method does, in fact, imitate nature. Natural clearcutting occurs as a result of wildfire, wind, insects and disease. We have had the opportunity to observe how Forests which succumb to these natural forces return to production. Knowledge gained from the exploitive land clearings a century ago and examining our current Forests, even-aged Forest, help us to understand the silvicultural benefits of clearcutting. Combined with the knowledge that many species of trees will not grow and reproduce well in uneven-aged Forests, this reassures us in our belief that even-aged management is the most appropriate on much of the Wayne National Forest.

FEIS, p. 2-18.

The FEIS also notes, at p. 2-23:

> Clearcutting is as much a sustained yield system as selection cutting, and results in areas which regenerate naturally, grow rapidly, and help ensure healthy future forests.
>
> Areas harvested by clearcutting regenerate rapidly and within 8 to 10 years are filled with regeneration 20 to 30 feet tall. By the time they are 20 years old, most people do not realize that they were even clearcut. At any time, the amount of the Forest with an "open canopy" from clearcutting will be less than 10 percent even in Management Areas 3.1 and 3.2. The open area greatly increases the capacity of the Forest to support some species of wildlife.

Plaintiffs' characterization of the consequences of even-aged management as producing monocultural "tree farms" is not supported by the record. The Plan indicates that regeneration after even-aged timber harvesting will be by natural means, not artificial planting. Plan, Appendix, p. C-4. Natural re-seeding will provide a diverse mixture of trees just as would occur after a forest fire or windstorm.

On the other hand, a plan which allowed no vegetative management would result in its own form of monoculture: a dark high-canopy forest in which only shade tolerant species can survive and in which valuable hardwood timber rots on the stump or on the ground. See Plan, Appendix, p. C-2; FEIS, p. 2-23; DEIS, p. 4-27.

The Plan limits clear cuts to a maximum size of 30 acres in management areas 3.1 and 3.2, 20 acres in management area 3.3 and 15 acres in management area 6.1. ROD, p. 17. The Plan incorporates standards and guidelines to lessen the visual impact of clearcutting, including the shape and location of openings, the retention of important vegetative features, road location and design and disposal of logging debris. ROD, p. 18. The Secretary's regulations require that when openings are created by the application of even-aged management, they "shall be shaped and blended with the natural terrain, to the extent practicable, to achieve aesthetic, wildlife habitat, or other objectives established in the plan." 36 C.F.R. § 219.27(d)(1). In response to public comments the number of acres proposed for even-aged management was reduced by 8,375 acres. ROD, p. 18.

Plaintiffs have failed to show that the choices of uneven-aged management as the predominate silvicultural system and of clearcutting as the predominate harvest method were arbitrary or unreasonable. In enacting 16 U.S.C. § 1604(g),

Congress considered the arguments for and against clearcutting in the National Forests and struck a delicate balance between two extremes. It chose not to prohibit clearcutting but to regulate it, leaving the technical management responsibility for the application of the NFMA guidelines on the Forest Service. "Within its parameters the management decision belongs to the agency and should not be second-guessed by a court." Bergland, 473 F.2d at 210.

The Plan determines that in certain management areas, clearcutting is the optimum harvest method to meet its objectives and requirements, but recognizes that there may be specific sites within those areas where clearcutting would not be appropriate. This would include sites where the slope or soil conditions are not conducive to clearcutting, or sites where soil or exposure is not conducive to oak-hickory regeneration. These matters, as well as the specific environmental impacts of a specific timbering project, will be addressed on a site-specific basis at the time of a proposed timber sale. While the Plan narrows the scope of future environmental analyses, an environmental analysis will be completed for each project which will focus on site-specific issues, alternatives and environmental consequences unique to the project. Plan, p. 5-2.

In ruling on the administrative appeal of the Sierra Club, the Chief of the Forest Service explained the relationship between the optimality determination contained in the Plan and site-specific issues which will be addressed on a project-by-project basis:

> The optimality determination in the Wayne Forest Plan is appropriate as programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain

> areas of the forest to achieve specific management objectives. However the analysis and final decision on the appropriateness of even-aged management, or the optimality of clearcutting, must be made as a site-specific determination at the project level during Forest Plan implementation and must follow National Environmental Policy Act procedures.

Decision Letter, Appeal No. 2309, Docket No. 2, Nov. 14, 1990, p.6.

Plaintiffs argue that under recently adopted Forest Service NEPA regulations, some timber sales will escape further review.[2] The regulation in question applies to timber sales of 250,000 board feet or less and is premised on the agency's judgment that sales in such small amounts would have no significant environmental impact. The validity of the regulation is not an issue before the Court. Although such sales are categorically exempted from environmental analysis when the Forest Service determines that no extraordinary circumstances exist, the decision to proceed must be documented and interested and affected persons must be notified and they have the right to appeal. 36 C.F.R. § 217.3. The court is not persuaded that this regulation renders any determination made in the Plan unreasonable or arbitrary.

Plaintiffs argue that there is no justification to allow any significant timbering on the Wayne and support this argument in part with the assertion that "for some years timbering has been almost entirely forbidden in the Hoosier National Forest" which until recently was jointly administered with the Wayne. Plaintiffs' Revised Motion for Summary Judgment, p. 24.

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[2] Federal Register, Vol. 57, No. 182, § 31.2.

There is nothing in the record to support this assertion.[3] The Hoosier National Forest is 250 miles from the Wayne in another state, and there is nothing in the record of this case which would support an argument that decisions reached there would be relevant to this Court's consideration of the Plan for the Wayne. To exclude timbering in favor of other uses would be a violation of the MUSYA and would deprive the Forest Service a valuable forest management device.

ALLOCATION OF LANDS THAT ARE UNSUITABLE FOR TIMBER PRODUCTION

Title 16, U.S.C. § 1604(k) provides in part as follows:

> In developing land management plans pursuant to this subchapter, the Secretary shall identify lands within the management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible, as determined by the Secretary,...

Lands so identified are generally exempt from timber harvesting for a period of ten years. Id.

Plaintiffs claim that the Forest Service failed to designate sufficient physically unsuitable land, failed to adequately assess the availability, cost and effectiveness of mitigation measures necessary to prevent irreversible damage and failed to adequately analyze the impacts of the Plan on water resources.

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[3] After oral argument on the cross-motions for summary judgment, counsel for defendants filed a copy of the April 8, 1991 ROD for the Land and Resource Management Plan Amendment for the Hoosier National Forest which provides for a timber harvest of up to 4.4 million board feet per year.

In order to implement the mandate of 16 U.S.C. § 1604(k), the Secretary adopted 36 C.F.R. § 3219.14, which provides the criteria for identifying lands which are not suited for timber production. The criteria for physical unsuitability are: (1) the land is not forest land[4]; (2) technology is not available to ensure timber production from the land without irreversible resource damage to soil productivity or watershed conditions; (3) there is not reasonable assurance that such lands can be adequately restocked; and (4) the land has been withdrawn from timber production by an act of Congress, the Secretary of Agriculture, or the Chief of the Forest Service. 36 C.F.R. § 219.14(a)(1)-(4).

The forest planners found that available technology could ensure timber production on 169,215 acres of the Wayne without irreversible resource damage to soils productivity, or watershed conditions. Plan, p. 4-7; DEIS Appendix, pp. B3-B37. The Plan contemplates that the effects of timber harvesting will be controlled by the design of timber sale areas using standards and guidelines that will adequately protect these resources. See Plan, pp. 4-28 to 4-38 and Appendix F; FEIS, p. 2-17. The Plan identifies the technology to be used in preventing irreversible damage and provides for its implementation. See Citizens for Environmental Quality v. United States, 731 F. Supp. 970, 985 (D. Colo. 1989). The Plan's standards and guidelines generally limit roads to slopes no greater than 35%, provide soil sensitivity standards for various logging activities, and require watershed protection measures such as filter strips in which no earth-disturbing

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[4] Forest land is defined generally as land which is at least 10% occupied by forest trees. See 36 C.F.R. § 219.3.

activities will occur unless special techniques are used to minimize potential detrimental effects. Id. As noted above, a separate environmental analysis will be conducted at the time of any proposed timber sale. The forest planners concluded that available techniques would control soil and watershed impacts from timber harvesting to the point of insignificance. DEIS, p. 4-3, Table 4-1. Plaintiffs have not shown that this determination was arbitrary or capricious.

The Court rejects the plaintiffs' claim that the forest planners were required to estimate the cost of available technology in order to determine if it is "available" within the meaning of 36 C.F.R. § 219.14(a)(2). Plaintiffs' reliance on Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) is misplaced. Robertson involved a special use permit authorizing the development of a major ski resort in the Okanogan National Forest, not a programmatic plan for the entire forest. The cost of mitigation measures is site-specific. The cost of mitigation measures is borne by the purchaser. FEIS, p. 2-18. If the cost of required mitigation measures at any specific site renders the timber sale unprofitable, then it is safe to assume that it will not occur. The Forest Service's interpretation of 36 C.F.R. § 219.14(a)(2) is not plainly erroneous or inconsistent with the regulation. Larionoff, 431 U.S. at 872.

Plaintiffs claim that the record "is totally lacking in any meaningful or adequate analysis of water quality related issues." Plaintiffs' Revised Motion For Summary Judgment. However, as noted earlier, the forest planners did consider the impact of timber harvesting on watershed quality and concluded that it would not cause irreversible resource damage. The Plan includes forest-wide guidelines and procedures for the protection of water and soil resources. See

Plan, Chapter 4. The DEIS describes the quality of the surface water in the forest and the types of pollutants that impact those waters. DEIS, p. 3-10. The DEIS also recognizes that water quality may be affected by timber harvesting and the development of recreation facilities, structures and roads. DEIS, p. 4-86. The Plan provides for the monitoring and evaluation of these management activities. Plan, p. 5-3. This level of documentation is adequate for a programmatic forest plan. Plaintiffs have asked the Court to revisit its ruling on the need for detailed information on such site-specific developments as the construction of a sewage treatment facility. See Memorandum Opinion and Order, March 8, 1993, p. 14. The Court will adhere to the position taken in its earlier order for the reasons stated therein. When a programmatic EIS is prepared, "site-specific impacts need not be fully evaluated until a 'critical decision' has been made to act on site development." California v. Block, 690 F.2d 753, 761 (9th Cir. 1982). See also Lujan, 961 F.2d at 890-891.

Plaintiffs claim that in authorizing below-cost timber sales defendants have violated the economic suitability requirement of § 1604(k). They claim that defendants improperly allowed timber harvest levels to determine whether land was included in the suitable timber base. They argue that § 1604(k) requires that economically unsuitable land be identified and removed from the timber production base prior to the selection of harvest levels, and they assert that the Secretary's regulations on economic suitability are in conflict with § 1604(k).

Section 1604(k) does not impose a strict economic test for the suitability of timbering. The statute requires forest plans to identify lands which are not suitable for timber production considering economic "and other pertinent factors to the extent

feasible, as determined by the Secretary." Section 1604(k) does not identify the specific economic factors to be considered in determining which lands are not suited for timber production but leaves that to the determination of the Secretary. While § 1604(k) makes it clear that Congress intended economic factors to be a consideration in determining whether land is suitable for timber production, it is likewise clear that Congress did not require that economic factors alone should be determinative. The statute vests the Secretary with broad discretion to consider a variety of possibly conflicting factors in determining whether an area is suitable for timber production. Congress allowed the agency to choose its own method for balancing physical, economic and other considerations in determining the suitability of lands for timber production. Acting pursuant to this broad grant of discretion, the Secretary adopted criteria for economic unsuitability in 36 C.F.R. § 219.14.

Pursuant to 16 U.S.C. § 1604(h), the Secretary was required to appoint a committee of scientists to provide advice and counsel on the guidelines and procedures for land management plans. The committee concluded that § 1604(k) did not require timber sales to meet specific economic criteria, but implied congressional concern that timber harvesting should not take place where "by some rule of reason public benefits were less than production costs." 44 Fed. Reg. 26,630 (1979). The committee recommended cost benefit criteria to be applied before the development of plan alternatives. The Secretary adopted the committee's cost-benefit criteria, but chose to apply them as part of the planning process outlined in 36 C.F.R. § 219.14.

The regulation provides a two-stage analysis for economic suitability. The first stage, contained in 36 C.F.R.

§ 219.14(b), determines the financial costs and economic benefits of a proposed management prescription. The second stage is a flexible analysis which estimates the indeterminate values of non-economic benefits such as aesthetics and recreation. The goal of the two-stage analysis is to exclude lands for timber production if they are not "cost-efficient" in meeting the overall plan objectives. "Cost efficiency" includes consideration of both monetary and non-monetary costs and benefits. Under 36 C.F.R. § 219.14(c)(3), lands must be tentatively identified as not appropriate for timber production where the "lands are not cost-efficient, over the planning horizon, in meeting forest objectives, which include timber production."

Plaintiffs' argument that the statute precludes consideration of production goals as part of this determination is not well founded. See Citizens For Environmental Quality, 731 F. Supp. at 988. Plaintiffs' argument that the determination of economic suitability must occur before the development of plan alternatives likewise fails. It is within the Secretary's discretion to apply the economic suitability test at the planning stage.

The interpretation put on a statute by the agency charged with administering it is entitled to deference. Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 31-32 (1981). A court should follow the construction of a statute by those charged with its execution unless there are compelling indications that it is wrong. Michigan United Conservation Clubs v. Luian, 949 F.2d 202, 206 (6th Cir. 1991), quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

The forest planners determined that the total net forest area was 176,787 acres. Of that area, 169,215 acres were

determined to be physically suitable for timber production. After applying the cost-efficiency analysis, another 43,108 acres were removed from the timber base leaving 126,107 acres as suitable for timber production. This is about 75% of the total net forest area. ROD, p. 19. This was a reduction from the previous plan which had identified 166,000 acres as suitable. ROD, pp. 18-19. The forest planners determined that the maximum allowable sale quantity (ASQ) would be 7.5 million board feet ("MMBF") per year, a reduction from 9.7 MMBF in the previous Plan. Id. The ASQ does not determine the actual amount of timber which will be sold but sets the upper limit for the plan period. The actual amount of timber sales may be less and will depend on several unpredictable factors, including the budget of the Forest Service, the market for wood products and other conditions which may limit the practicality of offering sales at levels developed in the Plan. Decision Letter, Appeal No. 2813, Docket No. 2, January 14, 1992, p. 9 (hereinafter "Citizens Council Appeal Decision"). See ROD, pp. 18-19. The ASQ of 7.5 MMBF is well below the estimated long-term sustained yield capacity of the forest and is only 40% of current timber industry demand. Id., ROD, p. 19. The Plan has a lower level of timber harvest than some of the alternatives considered. Id. There is no evidence that the forest planners gave undue weight to timber production goals in the suitability analysis or that they capitulated to timber industry interests.

The justification for below-cost sales is set forth in the ROD, p. 20-21, as follows:

> To accomplish the Plan's goals and the Forest's desired future condition requires treatment of the vegetation. Commercial timber harvest has traditionally been the preferred method to

manage vegetation through applied silviculture. Timber harvest is viewed as the most technically sound and least costly method of vegetative management.

* * *

[T]he overall timber sale program is expected to provide a positive cash revenue to the Forest. The cash revenue of below cost sales are less than the cost to the U.S. in preparing and administering the sales, plus the cost of road construction and reconstruction and reforestation. However, this approach to accounting was not used in the analysis of alternatives. The cost versus revenue approach ignores a fundamental principle that must be taken into account in evaluating the economics of the Forest Service's timber sale program. The Forest Service is required by law to manage the National Forests for multiple use. The real measure of the worth of the timber program is not costs versus revenues, but costs versus public benefits. This is the approach that was utilized in our analysis. Public benefits can be measured as receipts and as the dollar value of benefits for which revenues are not received, such as recreation. Unfortunately, some benefits are impossible to value in dollar terms or other readily quantifiable measures.

The treatment of vegetation through timber sales complements other uses of the Forest. For example, timber sales are often an effective means of improving or maintaining the visual quality on the Forest....Improved visual quality contributes to high quality dispersed recreation use in the long run. By providing for a variety

of tree species, age and size in timber stands, the Forest Service can achieve and maintain a forest less susceptible to insects and disease.

A variety of wildlife habitats are provided by a diversity of timber stand age classes and tree species. Timber sales are the most economically viable means of achieving desired plant and animal diversity. Our publics put high values on wildlife-associated recreation and the visual amenities of the Forest. If these benefits were provided through a method other than commercial timber sales, costs would be significantly higher and would eliminate returns to the Treasury. If the visual, wildlife, and recreation benefits were added to the returns to the Treasury, timber sale benefits would substantially exceed the costs.

See also DEIS, pp. 2-77 through 2-87. Plaintiffs have not shown that the cost benefit analysis supporting the planned timber sales in the Wayne was arbitrary or capricious.

Plaintiffs have made reference to the July 31, 1985 decision of Douglas W. MacCleery, Deputy Assistant Secretary of Agriculture, in the matter of the review of the administrative decision of the Chief of the Forest Service related to the administrative appeals of the Forest Plan and Environmental Impact Statements for the San Juan National Forest and the Grand Mesa, Uncompahgre, and Gunnison National Forests ("San Juan/GMUG").[5] The MacCleery decision found that the planning documents provided inadequate information on the

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[5] Sometimes referred to variously as the "MacCleery decision" or the "San Juan decision."

economic implications of continuing and increasing a timber sales program where costs substantially exceed revenues. In rejecting the plaintiffs' administrative appeals in the instant case, the Chief of the Forest Service found that the MacCleery decision did not apply to the Wayne because the Plan does not increase but decreases the timbering program. He also found that the planning documents for the Wayne did address many of the economic factors noted in the MacCleery decision. Citizens Council Appeal Decision, p. 7. The Court further notes that the MacCleery decision was based at least in part on concerns about the fact that the San Juan/GMUG plan reduced economic efficiency. Here, while the present net value of the Plan is 10% less than the former Plan, the decrease is attributed not to timber harvesting but to increases in semi-primitive recreation areas and uneven-aged management, which plaintiffs advocate. See DEIS, p. 2-97. It appears that the Chief of the Forest Service reasonably interpreted the MacCleery decision and his interpretation of the agency's prior ruling is entitled to deference. Furthermore, the Regional Forester has sufficiently explained why the Plan maximizes net public benefits even though it includes below-cost timber sales.

Plaintiffs claim that the forest planners allowed the fifth decade harvest level to dictate the timber base and that this violates the Secretary's suitability regulation. The Plan, Table 4-1, indicates that the fifth decade timber harvest level is a projection based on the increasing maturity of the forest over the next fifty years. See FEIS, p. 2-21. It is not apparent to the Court that this projected output controlled the planners' determination of the suitable timber base. Even if it did, the Court is not convinced that this would be arbitrary or capricious or contrary to the statutes or the regulations. The amount of suitable timber base does not represent the amount of timber which will be harvested. As noted above, the

amount of timber that can be harvested is limited by the ASQ and the actual amount harvested will be determined by budgets, market factors and other conditions. See infra, p. 24. If the suitable timber base exceeds the amount required to meet the timber production goals of the Plan, that appears to be of little consequence except to give the Forest Service greater latitude in determining just where in the forest the timber harvests will occur. This approach seems consistent with the use of timber harvesting as a forest management tool.

CONSIDERATION OF A BROAD SET OF ALTERNATIVES

Plaintiffs argue that the alternatives proposed in the planning process did not present a broad set of alternatives for consideration and review as required by the applicable statutes and regulations. Plaintiffs specifically allege that the alternatives proposed did not present a sufficiently broad set of alternatives for the range of timber base, length of rotational period of timber harvests and the provision of semi-primitive recreation. None of these arguments were raised in plaintiffs' administrative appeal. The only objection raised there regarding an insufficient range of alternatives related to the forest road system. See Citizens Council Statement of Reasons, pp. 40-43; Citizens Council Appeal Decision, pp. 11, 12. Claims based upon issues which have not been addressed in the administrative appeal are barred. Cisternas-Estay v. Immigration and Naturalization Service, 531 F.2d 155 (3d Cir. 1976); Getty Oil Co. v. Clark, 614 F. Supp. 904, 921 (D. Wyo. 1985) (court may not consider contentions that were not presented in the administrative proceeding below). However, in the interest of judicial economy, the Court will nevertheless address the merits of these newly raised arguments.

Alternatives prepared for consideration in an Environmental Impact Statement ("EIS") are intended to provide a broad range of reasonable management scenarios for the various uses of the forest. See 36 C.F.R. § 219.12(f). "The primary goal in formulating alternatives, besides complying with NEPA procedures, is to provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits, consistent with the resource integration and management requirements" of the NFMA regulations. Id. The purpose of a forest plan and supporting EIS is to develop overall guidance for management of all multiple-use resources. Citizens for Environmental Quality, 731 F. Supp. at 977. The alternatives are not intended to focus on specific outputs such as timber production or a specific form of recreation; instead, they are intended to "provide different ways to address and respond to the major public issues, management concerns, and resource opportunities identified during the planning process." 36 C.F.R. § 219.12(f)(4). Seven alternative plans were considered. They are described in general in the DEIS as follows:

> Seven alternatives for development of a Land and Resource Management Plan for the Wayne National Forest in Ohio are described and evaluated in this Draft Environmental Impact Statement (DEIS). The alternatives respond to public issues and management concerns and provide for different levels of goods, services, and uses. The alternatives are: (1) continuation of current management; (2) emphasis on economic efficiency; (3) emphasis on a wide variety of vegetative conditions and recreation opportunities; (4) emphasis on uneven-aged silviculture; (5) emphasis on a balanced mix of even-aged and uneven-aged silviculture, early and late successional habitat, and recreational opportunities; (6) emphasis on early successional wildlife habitat and off-road vehicle use; and (7) emphasis on a low intensity of management.

DEIS, p. i.

The DEIS identified eleven major public benefits which were varied to provide a wide range of benefits. DEIS, p. 2-14. Other benefits that were not considered to be major issues were also varied. Id. The alternatives are described and compared in the DEIS. DEIS, pp. 2-20 to 2-62. In alternative 1, 97% of the forest is allocated to even-aged management with a mixture of 80-year and 120-year rotation. Alternative 2 assigns 97% of the forest to even-aged management with a 120-year rotation. In the case of alternative 3, which became the Plan, 18% of the forest is allocated to uneven-aged management, 30% is allocated to even-aged management with an 80-year rotation, 33% is allocated to even-aged management with a 120-year rotation and 15% is allocated to semi-primitive recreation with a mixture of even-aged management with a 120-year or 160-year rotation and natural forest with no timber harvest. In alternative 4, 93% of the forest is allocated to uneven-aged management. Alternative 5 allocates 42% of the forest to uneven-aged management, 40% to even-aged management with an 80-year rotation, and 25% to semi-primitive, non-motorized recreation with a mixture of even-aged management with a 120-year rotation and natural forest with no timber harvest. Alternative 6 assigns 72% of the forest to uneven-aged management with an 80-year rotation, and 25% to even-aged management. Alternative 7 is a low intensity management option with a timber base of only 15,588 acres, in which 75%

of the forest is assigned to even-aged management and 22% is assigned to semi-primitive non-motorized recreation with a mixture of even-aged management with a 120-year rotation and natural forest with no timber harvest. The amount of land classified as suitable timber land ranges from 17,878 acres in alternative 7 to 147,742 acres in alternative 6. DEIS, Appendix B, Table B3-9.

NEPA requires that the EIS set forth only those alternatives sufficient to permit a reasoned choice. Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974). NEPA does not require an agency to consider alternatives that do not achieve the purpose of the proposed action. Thus, the focus of the Court's inquiry is whether the agency adequately considered alternatives "reasonably related to the purposes of the project." Northwest Coalition for Alternatives to Pesticides v. Lyng, 844 F.2d 588, 593 (9th Cir. 1988). The Court concludes that the alternatives described in the DEIS provide an adequate basis for identifying the alternative that comes nearest to maximizing public benefits, as required by NFMA regulations. The Court concludes that the Forest Service considered a reasonable range of alternatives as required by NEPA.

USE OF THE FORPLAN COMPUTER MODEL

Plaintiffs criticize the manner in which the forest planners used FORPLAN, a computer program designed for use in forest planning. The Court has reviewed plaintiffs' arguments regarding the use of FORPLAN but finds no support in the record for the conclusion that it resulted in any decisions which were arbitrary or unreasonable. Plaintiffs contend that arbitrary and capricious assumptions regarding the recreation values of timbering were input into the FORPLAN model which caused the program to assume that timbering was

necessary for recreation. They assert that this error can be demonstrated by studying the FORPLAN computer run of "Max PNV[6] market" and "Max PNV assigned." Plaintiffs dispute the forest planners' assumptions about recreation values, claiming that they overestimate the benefits to recreation from timbering. The DEIS indicates that recreation values used in the planning process were based upon the 1980 RPA National Assessment, a document compiled by the Secretary of Agriculture every ten years, which contains facts and analyses to develop and guide public and private forest and rangeland policies and programs. See DEIS, Appendix, p. B4-13 and Glossary. Recreation values developed at the regional level for the 1980 RPA Assessment were used to estimate the wildlife and recreation values used in the FORPLAN model. DEIS, Appendix, p. B4-13 and Table B4-6. There is nothing in the record to support plaintiffs' argument that these values are arbitrary and capricious. There is no evidence that they are based on inadequate research and analysis, or that their validity is otherwise undermined.

Plaintiffs object to the planners' failure to consider the greater value of semi-primitive non-motorized recreation in the Wayne because of the limited opportunity for such recreation in southeastern Ohio. However, the planners recognized that semi-primitive recreation in the Wayne should be valued

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[6] PNV or present net value is the difference between the dollar value of outputs resulting from management activities and the costs of those management activities, discounted to present value. See 36 C.F.R. § 219.3. NFMA regulations require the Forest Service to compute economic benchmarks for the PNV of outputs that have an established market price ("market PNV") such as timber and developed recreation and the PNV of outputs with an assigned market price (assigned PNV) such as dispersed recreation. 36 C.F.R. 219.12 (e)(1)(iii).

higher than indicated in National Willingness to Pay studies and included the difference in the category of non-priced benefits. See DEIS, Appendix, p. B4-17.

DIVERSITY

Plaintiffs argue that the Plan fails to provide for diversity of plant and animal communities as required by the NFMA and its regulations. They argue that clearcutting threatens wildlife diversity, and that proper consideration of diversity of plant and animal communities requires preservation of old growth and mature forest areas as opposed to early successional conditions which occur under even-aged management. Under 16 U.S.C. § 1604(g)(3)(B), the regulations for land use plans must:

> provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan;

The committee of scientists formed to advise the Secretary on the formulation of the NFMA guidelines concluded that it was impossible to write specific regulations which would provide for diversity. The scientists stated:

> Provision for "diversity" as required by NFMA is one of the most perplexing issues dealt with in the draft regulations. We believe it is

> impossible to write specific regulations to "provide for" diversity.

44 Fed. Reg. 26600-01. The regulation ultimately adopted by the Secretary, contained in 36 C.F.R. § 219.26, provides as follows:

> Forest planning shall provide for diversity of plant and animal communities and tree species consistent with the overall multiple-use objectives of the planning area. Such diversity shall be considered throughout the planning process. Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition. For each planning alternative, the interdisciplinary team shall consider how diversity will be affected by various mixes of resource outputs and uses, including proposed management practices. (Refer to § 219.27(g).)

The text of 36 C.F.R. § 219.27(g) provides in part:

> Management prescriptions, where appropriate and to the extent practicable, shall preserve and enhance the diversity of plant and animal communities...so that it is at least as great as that which would be expected in a natural forest and the diversity of tree species similar to that existing in the planning area. Reductions in diversity of plant and animal communities and tree species from that which would be expected in a natural forest or from that similar to the existing diversity in the planning area, may be prescribed only where needed to meet overall multiple-use objectives.

Although the natural forest is used in the regulations as one point of reference for evaluating diversity, the regulations do not imply that diversity can only be achieved by attempting to recreate the conditions of the natural forest.

The Secretary's regulations do not require the planners to use any particular method in their analysis of diversity; rather, they focus on the measurement of the impacts of the proposed management practices on the inventoried flora and fauna of the forest. They direct the Forest Service to select management indicator species of fish and wildlife to ensure viable populations of those species and to provide for research and monitoring. See 36 C.F.R. § 219.19. Pursuant to the regulations, the planners identified the principal habitat components of all plants and animals that occur in the Wayne. They then selected management indicator species for the Forest which would be representative species for all habitat types and conducted an inventory and analysis of the habitat requirements of these species. See Plan, Appendix B; DEIS, pp. 3-19 to 3-21 and Appendix C; FEIS, Appendix E. They did all of this with the assistance of several committees comprised of members of nine Ohio universities, officials of the Ohio Department of Natural Resources and biologists employed by the United States Fish and Wildlife Service. In addition, the planners identified "sensitive species" as a further means of maximizing bio-diversity. See Plan, p. 4-44; DEIS, p. 3-22. The Plan and the FEIS both set forth specific procedures and methods for monitoring and evaluating bio-diversity. See, e.g., Plan, pp. 5-1 to 5-13.

Plaintiffs argue that the Plan does not adequately consider the areas which surround the Wayne. The NFMA regulations expressly state that the diversity requirements apply "within the area covered by a land and resource management plan." 36

C.F.R. § 219.3. Under NFMA forest plans are to govern "units of the National Forest System." 16 U.S.C. § 1604(a). The Forest Service has the discretion to consider conditions surrounding the forest but it is not required to compensate for them in the Forest Plan. Here, the forest planners did consider the area surrounding the Wayne. See, e.g., DEIS, p. C-5; FEIS, pp. 2-24 to 2-29.

Plaintiffs criticize the Plan for failing to provide for bio-diversity by maintaining a natural forest environment. The Wayne, however, is not a natural forest. An estimated fifty percent of the original forest of southeastern Ohio was cleared by 1850. An almost complete removal of the remainder, as well as the second growth, occurred from 1850 to 1880 to fuel the native iron ore smelting industry which consumed all trees down to three to four inches in diameter. A second nearly complete removal of the second and third growth forests occurred again for the charcoal industry between 1880 and 1950. When the Forest Service began acquiring lands for a national forest in the middle 1930's, the Wayne consisted of previously cleared land consisting of a mixture of reverting old fields, eroded areas, and young cutover timber stands. DEIS, Appendix, p. C-3. At present, only nine percent of the Wayne consists of old growth forest. See DEIS, Appendix, Table C-1.

The Plan, however, does provide for the development of areas of mature growth within the forest. Management areas 3.3 and 6.1 specify a 120-year rotation. By the end of the fifth decade, almost 30% of the forest will consist of hardwood trees over 100 years old. DEIS, Table 4-30, p. 4-57; ROD, pp. 33-34; FEIS, pp. 2-28 to 2-49. More than 17,000 acres are allocated to old growth in area 6.2 where no timbering will occur. ROD, p. 15. An additional 4,000-plus acres of old

growth will occur in other management areas. Id. After 50 years there will be a total of 55,000 acres of late successional habitat. Id. The percentage of mature forest is increased over the life of the Plan. In response to public comment the area of old growth forest was increased by 6,030 acres. Id.

The planners considered the effects of various timber harvesting methods on forest diversity. See DEIS, pp. 4-18, 4-21. With respect to clearcutting, the FEIS, p. 2-17, states:

> Clearcutting is the method that can slow the change from oak-hickory to the more mesic mixed hardwoods that is presently occurring on the Forest because of natural forces. Oak and hickory are important to a variety of wildlife species on the Forest ....
>
> Forest stands of mixed species of trees resulting from clearcutting and changing climatic conditions may be more desirable than many existing stands. Research and diversity survey data have shown that regeneration following the clearcutting method exhibits a diversity of tree species at least as great as what would be expected in a natural forest or what exists today. These Forest stands will be more resistant to insect and disease attacks and provide greater utility for some wildlife.

The goal of diversity under the NFMA is "based on the suitability and capability of the specific land area" and is specifically linked to the "overall multiple-use objectives" of the land management plan. 16 U.S.C. § 1604(g)(3)(B). Diversity is not the controlling principle in forest planning, although it is an important goal to be pursued in the context of overall multiple-use objectives. The Court concludes that the Plan provides diversity of plant and animal communities while

balancing a mix of multiple uses. While the alternatives and mix of uses that the forest planners chose were not those favored by the plaintiffs, the Plan does meet the requirements of the applicable statutes and regulations, is well within the discretion vested in the Forest Service and is not arbitrary and capricious.

CONCLUSION

The Court concludes that in adopting the Plan for the Wayne, the Forest Service considered all of the relevant factors, and the Court is not persuaded that the Forest Service has committed any clear errors of judgment in adopting the Plan. Overton Park, 401 U.S. at 416. The Secretary's decision is entitled to a presumption of regularity. Id. at 415; Druid Hills Civic Association v. Federal Highway Administration, 772 F.2d 700, 714 (11th Cir. 1985). As the Court noted in Resources Limited, Inc. v. Robertson, 789 F. Supp. 1529, 1540 (D. Montana 1991), "the Forest Service is faced with a nearly impossible task of serving many different interests." Here, the agency, after considerable review, analysis and public involvement, chose an alternative which attempts to strike a reasonable balance between and among all of the competing uses. Plaintiffs disagree with the selected alternative but it is not for the courts to decide whether the decision was necessarily the best one or the one the Court would have chosen. Congress has vested the Forest Service with the discretion to make these decisions, and its decisions must be upheld by the courts unless they are arbitrary, capricious or contrary to law. Plaintiffs have failed to show that in adopting the Plan for the Wayne, the Forest Service acted arbitrarily or capriciously or that the Plan is contrary to law.

In accordance with the foregoing, defendants' motion for summary judgment is granted, and plaintiffs' motion for summary judgment is denied. The clerk shall enter final judgment in favor of the defendants dismissing plaintiffs' complaint with prejudice at plaintiffs' costs.

It is so ORDERED.

/s/James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: March 11, 1994

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Sierra Club, et al.,	)	[Filed March 8, 1993]
	)	
Plaintiffs,	)	Civil Action No. C2-92-249
	)	
vs.	)	JUDGE GRAHAM
	)	MAGISTRATE JUDGE ABEL
F. Dale Robertson, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

In this action, Plaintiffs challenge the Defendants' decision to adopt a long-term plan for the management of the Wayne National Forest ("WNF") and an accompanying environmental impacts statement, alleging violations of the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1601-1614, the Multiple Use Sustained Yield Act, 16 U.S.C. § 528 et seq., and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. This action is brought under the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 1701 et seq.

In a preliminary pretrial conference held on September 9, 1992, Plaintiffs asserted the right to present expert testimony and requested an evidentiary hearing. Defendants objected on the ground that the Court's role should be limited to a review

of the agency's action, based upon the administrative record. Magistrate Judge Abel directed defendants to file a motion in limine addressing this issue and they did so on October 15, 1992. The intervenor, Ohio Forestry Association, Inc., filed a similar motion on the same date. Plaintiffs filed their rule that a court's review of administrative decisions is limited to the administrative record, citing Bradley v. United States, 26 Claims Court 699 (1992). This Court is not persuaded that NEPA cases are a special exception to the general rule, although it may well be that because of the issues involved in the usual NEPA case, courts may more often be inclined to invoke one of the recognized exceptions to the general rule. See Animal Defense Council v. Hodel, 840 F.2d 1432 (9th Cir. 1988).

Plaintiffs principally rely on two recognized exceptions to the general rule, which permit the Court to consider evidence outside the record, when it is needed: (1) to explain agency action or; (2) when it is needed to clarify technical matters involved in the agency action. Plaintiffs contend that they should be permitted to offer additional evidence for the purposes of explaining or addressing technical or scientific issues involved in the administrative record and to identify significant environmental impacts or issues which were not addressed by the agency.

The Sixth Circuit Court of Appeals has recognized exceptions to the general rule limiting a court's review to the administrative record. In Norwich Eaton Pharmaceutical, Inc. v. Bowen, 808 F.2d 486, 489 (6th Cir. 1987), the court quoted with approval the rule adopted by the Ninth Circuit in Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980):

> It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not.

In United States v. Azko Coatings of America, Inc., 949 F.2d 1409, 1428 (6th Cir. 1991), the Sixth Circuit also noted:

> Other courts have similarly held that a reviewing court evaluating agency action on the administrative record may consider additional evidence as either background information to aid the court's understanding, or to determine if the agency examined all relevant factors or adequately explained its decision.

Nevertheless, the court further stated that a "reviewing court 'must be careful not to allow such evidence to change the character of the hearing from one of review to a trial do novo."' Id.; quoting Town of Burlington v. Dep't. of Educ., 736 F.2d 773, 791 (1st Cir. 1984).

In determining whether or not a party relying on one of the recognized exceptions to the general rule limiting review to the administrative record should be permitted to offer additional evidence outside the record, a court should consider whether that party had an opportunity to offer the evidence during the administrative proceedings. In Davidson v. United States Department of Energy, 838 F.2d 850 (6th Cir. 1988), the Sixth Circuit upheld the district court's refusal to consider plaintiffs' evidence which characterized the agency's validation study as incomplete, unprofessional and not in accordance with EEOC guidelines. In doing so the court noted, Id. at 855-856.:

The administrative record in this case reflects the rulemaking process conducted by DOE with a full opportunity for comment and response. The letters written by DOE to plaintiffs' union representatives, including plaintiff Davidson, gave the plaintiffs fair notice of DOE's proposed actions, and the public hearing conducted as part of the rulemaking process afforded plaintiffs ample opportunity to raise criticisms regarding the soundness and propriety of the validation study. Plaintiffs did not choose to voice their current concerns during the rulemaking process. If they had, their criticisms would have been incorporated in the administrative record for future judicial review. Having failed to do so, and thus having failed to afford the Secretary an opportunity to respond to those criticisms during the rulemaking process, plaintiffs will not be permitted to introduce new evidence in this judicial proceeding of their concerns, expressed nearly three years after the completion of the administrative process.

Similar considerations were a factor in the Sixth Circuit's approval of another district court's rejection of evidence outside the administrative record in Upjohn Manufacturing Co. v. Schweiker, 681 F.2d 480, 483 (6th Cir. 1982):

> It is to be emphasized that Upjohn did not file with FDA the affidavits which it now contends should have been considered by the district court. Upjohn could have filed a petition for reconsideration of FDA's approval of the Boots application. 21 C.F.R. § 10.33. By that procedure the affidavits could have been submitted to FDA and made a part of the administrative record for judicial review. Instead, Upjohn chose to present the affidavits for the first time in the district court.

Other circuit courts of appeals have upheld the rejection of evidence offered to supplement an administrative record where the party offering such evidence had the opportunity to raise the issue before the agency. In Havasupai Tribe v. Robertson, 943 F.2 32 (9th Cir. 1991) the Ninth Circuit affirmed the district court's refusal to consider evidence outside the record under circumstances quite similar to those present in the instant case. In Havasupai Tribe, the tribe challenged a decision of the Forest Service approving the development of a uranium mine in the area of the Grand Canyon, alleging that the Forest Service did not adequately consider the effects of such a mine on their water supply as required by NEPA. The district court limited its review to the administrative record and refused to admit additional evidence tendered by the tribe. The Ninth Circuit affirmed, stating Id. at 34:

> The Tribe's most troubling claim is that there was inadequate consideration by the government of the effects of the mining on groundwater which supplies the Tribe's water. In support of this claim, however, the Tribe relies upon the contentions of Dr. David Kramer, which were made in a letter drafted after the final EIS issued. The Tribe had some obligation to raise these issues during the comment process. Its views were solicited. Absent exceptional circumstances, such belatedly raised issues may not form a basis for reversal of an agency decision. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54, 98 S. Ct. 1197, 1216-17, 55 L.Ed.2d 460 (1978).

Thus, in considering whether the Plaintiffs should be permitted to offer the evidence they now tender, the Court

must consider not only whether the evidence fits one of the recognized exceptions to the general rule that the Court's review is limited to the administrative record, but also whether Plaintiffs were afforded an adequate opportunity to present this evidence to the agency during its deliberative process, and if so, whether there are any exceptional circumstances which excuse their failure to do so.

The management of the national forests is entrusted to the United States Department of Agriculture Forest Service. The NFMA requires the Forest Service to develop long-term plans for the management of national forests. The legislative history of the Act indicates that one of its goals was "to get the practice of forestry out of the Courts and back into the forests." 122 Cong. Rec. at 33835 (1976). Under NFMA and its regulations, the development of a forest management plan proceeds through a series of steps which ensure public involvement at each stage of the planning process. See 36 C.F.R. § 219.6, § 219.10, § 219.12. The first step is to canvass the public and the agency staff to identify the issues that the plan should address. Once that assessment is completed, several alternative management plans are constructed and each is subjected to an analysis of costs, benefits and environmental impacts, in accordance with NEPA. After reviewing the environmental impacts and the cost benefit analysis, the Regional Forester for the administrative region in which the forest is located selects the alternative that in his opinion will "provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long-term net public benefits in an environmentally sound manner." 36 C.F.R. § 219.1(a), § 219.10(c). The approved plan controls all activity within the forest for a ten to fifteen-year period.

The planning process for the WNF began in 1981 and continued over a period of five years. In August, 1986, the Forest Service published the proposed plan together with a draft environmental impact statement ("DEIS") and distributed them to the public for comment for a ninety-day period. On January 4, 1988, after analyzing over 1,500 written comments, the Forest Service adopted the final plan accompanied by a record of decision ("ROD") and a final environmental impact statement. ("FEIS")

Both Plaintiffs participated extensively in the initial planning process and in the comment period following publication of the proposed plan and the DEIS. Representatives of the Sierra Club attended public meetings to identify and discuss relevant issues in November 1981, October 1985, February 1986, and October 1986. DEIS Appendix A, pp. A-1, A-29, A-30. Members of the Plaintiff groups and the groups themselves sent letters commenting on the DEIS during the comment period. FEIS Appendix A, pp. A-4, A-6, A-9, A-11. Members of the Sierra Club participated in a workshop in February, 1987 which was held for the purpose of resolving major issues raised during the comment process. FEIS Appendix C, pp. C-1, C-2. Both Plaintiffs appealed the decision to adopt the final plan. Both were represented by counsel and both filed lengthy statements of reasons with attachments. Between May, 1988 and March, 1989, officials of the Forest Service met with representatives of each Plaintiff to attempt to resolve their differences. After the Regional Forester issued responsive statements to the Plaintiffs' filings, the Plaintiffs filed replies. In addition, the Sierra Club presented its views in an oral argument on October 20, 1989. Citizens Council declined to participate in the oral hearing. The Chief of the Forest Service issued decisions on November 14, 1990 and January 14, 1992,

denying Plaintiffs' appeals. Plaintiffs' filed this action on March 18, 1992.

Plaintiffs seek to introduce the testimony of seven expert witnesses. They have tendered affidavits and reports which contain the opinions and probable testimony of each of these potential witnesses. The Court will give individual consideration to whether each of them should be permitted to testify in this proceeding.

Ronald O'Toole

Mr. O'Toole is a forester and a forest economist who is familiar with a computer program known as FORPLAN, which is used by forest planners to develop forest plans. He was retained by the Sierra Club to prepare a detailed review of the WNF plan. In order to do this, he visited the Forest Supervisor's Office and examined computer runs and other background planning documents. O'Toole asserts that the DEIS incorrectly states that the Wayne FORPLAN model made all forest land available for non-timber prescription when in fact -- except for areas specifically placed in a non-timber category -- FORPLAN was only allowed to choose among different timber prescriptions. O'Toole's assertion is based on his interpretation of a table which is part of DEIS Appendix B. The FORPLAN computer modeling program is described in great detail in the DEIS, Appendix B, Part Three. Citing specific portions of the DEIS, Defendants show that the planners did make all acres of the forest available for non-timber management in their initial evaluation of the range of planning options and potential outputs. See DEIS Appendix B, p. B6-20. O'Toole's own report acknowledges that in two "benchmark" runs of FORPLAN, all areas of the forest were available for non-timber prescription. See O'Toole Report,

pp. 8, 18. Plaintiffs assert that O'Toole will show that an assumption not revealed in the planning documents was that recreation can only take place in areas where timbering is allowed. O'Toole's report, however, states that the model "explicitly assumed that the highest levels [recreation] could only take place in the presence of timber cutting." O'Toole Report, p.i.i.i. If the assumption is explicit, there is no need for O'Toole's testimony to demonstrate it.

The FORPLAN computer runs are part of the planning documents and are part of the administrative record. See Declaration of Robert K. Ballentyne and attached Planning Record Index. (Doc. 14) The Court concludes that the administrative record contains sufficient information to determine how the Forest Service used the FORPLAN computer program and whether there were any misrepresentations or unstated assumptions as alleged by plaintiffs.

O'Toole's basic objection to the plan seems to be based on cost efficiency, particularly the fact that the plan includes below-cost timber sales, which he believes is contrary to the NFMA. Plaintiffs made these arguments during the administrative proceedings and they may now argue to this Court that the Forest Service acted in an arbitrary and capricious manner in rejecting them and adopting the final plan. The Court finds no justification for admitting additional evidence outside the administrative record in order to address these arguments, nor have Plaintiffs advanced any reason why Mr. O'Toole's testimony and arguments could not have been presented during the administrative process.

James M. Northrup

Mr. Northrup is a principal in a private consulting firm which does environmental planning and analysis. He previously served as forest planner and NEPA Coordinator on the Green Mountain National Forest in Vermont. Northrup states that the WNFP planning documents are lengthy and contain much technical, complex information, which is communicated using legal, economic, silvicultural and other technical terms not commonly understood by the average citizen. He asserts that the criteria used by the Regional Forester to select the plan are not clearly stated in the ROD and that it focuses on differences among the alternatives considered instead of the rationale for selecting one over the others. He claims that the analysis of public demands for resources and uses is inadequately documented, appears fundamentally flawed, and may have been misapplied, and that the alternatives analyzed did not cover the reasonable range required by NEPA. He contends that an abbreviated FEIS is insufficient and that additional alternatives should have been considered in formulating the environmental impact statement. His fourteen-page affidavit contains these and other legal arguments and conclusory statements attacking the plan and the planning process and in many instances comparing it unfavorably with the plan adopted for the Green Mountain National Forest.

While it is true that the WNFP planning documents are lengthy and technical, courts are often called upon to analyze lengthy, technical material. The Court has found these documents to be intelligible and their concepts and terminology capable of being understood without expert assistance. It is not appropriate to admit evidence outside the record for the purpose of comparing the WNFP with the Green Mountain

National Forest Plan. The WNFP must stand or fall on its own merits, based upon the administrative record. Some of the points raised by Northrup were raised by the Plaintiffs during the administrative process and the record is adequate to evaluate those claims. To the extent that Northrup raises new objections to the plan, Plaintiffs have failed to show why they did not raise them earlier. To the extent that Northrup asserts legal objections to the plan, these can be asserted by counsel in their briefs on the basis of the facts contained in the administrative record.

For all of these reasons, the Court concludes that Mr. Northrup's testimony should not be admitted.

David R. Dewalle

Mr. Dewalle is a professor of forest hydrology. He is involved in teaching and research related to the water resource impacts of timber harvesting and other land uses. Plaintiffs have submitted an affidavit from Dr. Dewalle stating his opinion that the plan lacks detail to indicate that water resource issues have been adequately addressed or evaluated. His main point appears to be that the plan, "seems to miss the opportunity to improve water resource conditions in the region." Dewalle criticizes the plan's alleged failure to address the problems of erosion resulting from timbering and water pollution caused by previous exploitive activities such as strip mining and oil drilling. He further contends that the plan fails to address how sewage discharge will be handled in connection with future recreational sites that may be constructed or the effect of private development that may occur nearby.

The DEIS shows that consideration was given to existing water resources and the impact the plan would have on them.

The index to the DEIS contains nine references to water and water quality. Comments received in response to the DEIS included concerns that the DEIS considered water quantity rather than quality, that the DEIS failed to offer information on the cumulative impacts on water quality and that it should discuss measures to protect water quality, including water quality monitoring. The Forest Service responded to each of these comments. The plan itself contains numerous references to water and water quality. See Plan Index, Water, Water Holes, Wells and Cisterns. A reference to sewerage treatment facilities states that they will be adequately designed and maintained to protect water quality. See Plan, p. 4-143.

The plan specifically addresses water pollution resulting from abandoned underground coal mines and states, "At this time, an efficient and reliable method does not exist to reclaim these sites so that they do not contribute to the pollution of the streams and lakes." Plan, p. 3-15. Defendants point out (the Court believes correctly) that issues relative to sewerage treatment and handling facilities must await the planning of specific projects at specific locations. Finally, the administrative record discloses that the Forest Service considered the effects of erosion resulting from timbering activities.

It appears that the issues raised by Dewalle were addressed in the planning process and that the administrative record contains sufficient information for the Court to evaluate Plaintiffs' claims that the plan and the environmental impact statement do not sufficientiy address water quality concerns. Furthermore, the Court can discern no reason why Plaintiffs could not have presented Dewalle's criticisms to the agency during the administrative process.

A. Claude Ferguson

Mr. Ferguson has a Bachelor of Science degree in Forestry. He held various positions of employment with the Forest Service until 1976. He was the forest supervisor for the WNF in 1966. Plaintiffs have submitted a fifteen-page report authored by Mr. Ferguson, in which he outlines his objections to clearcutting as the dominant timber-harvesting method used in the plan. Ferguson expresses his opinions on the adverse consequences of clearcutting and attacks the grounds relied upon by the Forest Service in selecting it. He expresses other objections to the planning process. Much of Mr. Ferguson's criticism is based on the results of a Purdue University study of timber regeneration in the Wayne-Hoosier National Forest in Indiana, which was published in December of 1987, three months after the WNF plan was adopted. This study was not available to the Forest Service during the planning process. The Court must judge an agency's actions by the information available to it at the time it makes it's decision. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978). The Purdue study was, however, available to the Plaintiffs during the administrative appeal process and they offer no excuse for their failure to include it in their submission during the appeal process.

The plan, the DEIS and the FEIS show that considerable attention was given to the issue of clearcutting or "even-aged management." See Plan, Chapter 3, Vegetative Management.

Ferguson contends that the plan deceptively labels patch clearcutting as group cutting and categorizes it as uneven-aged management, contrary to accepted silvicultural practice. However, the DEIS at p. 4-24 et seq. defines how group

cutting is used in the plan and acknowledges that it can resemble clearcutting.

During the comment period, several commentors expressed objections to clearcutting, citing many of the reasons relied on by Mr. Ferguson in his report. See FEIS, Chapter 2, p. 215 et seq. The record is adequate to evaluate Plaintiffs' objection to clearcutting. In a general sense, Ferguson's objections were considered by the Forest Service during the administrative process, and to the extent that any of his objections were not specifically raised or addressed, it is only because Plaintiffs failed to raise them when they had the opportunity to do so.

Stephen M. McKee, James R. Runkle, William Buskirk

Mr. McKee describes himself as a botanist, ecologist and field naturalist. He received a Master of Science degree in botany from Miami University at Oxford, Ohio. He believes that the Forest Service was mistaken in its assessment of the effects of clearcutting on bio-diversity. According to Mr. McKee, the issue of bio-diversity should have been examined on a regional basis and the Forest Service should have been more concerned about preserving mature forest species. McKee also disagrees with some of the plan's assumptions regarding the nature of regrowth in harvested areas and the amount of' time necessary for regeneration after clearcutting, and notes the plan's failure to address contrary scientific views on the effects of clearcutting.

Runkle is an associate professor of biological sciences at Wright State University in Dayton, Ohio. He questions the plan's conclusion that 120-year rotations are sufficient to favor wildlife species that require mature and over-mature hardwoods. He believes that in reaching this conclusion, the

Forest Service focused on vertebrates and overlooked other species, including fungi, herbs, insects, and other invertebrates. He says the plan contains no data guaranteeing that the needs of such other species will be met. He believes the plan ignores landscape ecology, specifically, "how the spatial arrangement of different habitats in a large region ("landscape") affects the distribution and abundance of organisms living in that landscape." Finally, he questions the use of clearcutting as the preferred method for regenerating oak and hickory forests on the ground that this is scientifically uncertain. He believes that clearcutting should be postponed until new silvicultural techniques have been developed.

Buskirk is a biologist who is an expert in avian ecology. He believes that the plan overlooks certain environmental impacts because "the planners were unaware of or ignored recent evidence and perspectives in the scientific literature related to the conservation of biological diversity." He challenges the plan's assumption that full diversity of habitat types is needed to perpetuate biological diversity. He says that this assumption fails to recognize that some species are much less mobile than others and less likely to re-colonize areas of extinction after habitats have returned to predisturbance conditions. He says his opinions are based on developing scientific literature and he cites scientific publications as recent as 1992. Again, the decision of the Forest Service to adopt the plan must be judged on the information available to it at the time. Vermont Yankee, 435 U.S. at 553. He believes that some of the terminology used in the plan is "harvest-biased." He asserts that the plan overlooks the impacts of producing forest edges along clear cuts and the effects of invasion of native habitats by introduced "exotic" vegetation.

Most of the issues raised by McKee, Runkle and Buskirk are addressed, at least generally, in the administrative record. Plan Appendix B is devoted entirely to the issue of the plan's impact on plant and animal species. The plan further indicates that in choosing harvest methods and rotation ages, the Forest Service considered wildlife habitat diversity needs. See Plan Appendix C, p. C-5 et seq.; FEIS Appendix E, p. E-1 et seq.; DEIS pp. 4-21, 4-22, 4-40 et seq. These issues were also addressed during the administrative appeals. The Court concludes that the administrative record sufficiently addresses the general areas of concern raised by McKee, Runkle and Buskirk, and to the extent that specific concerns or objections were not raised or addressed, Plaintiffs have shown no excuse for their failure to raise them when they had the opportunity to do so during the administrative process.

Conclusion

The planning process for the WNFP began well over ten years ago. The full planning record contains tens of thousands of pages of documents. Plaintiffs were extensively involved in the planning process, the public comment process and the administrative appeal process. Now, plaintiffs want the Court to consider the testimony of seven expert witnesses, none of whom provided testimony, reports or affidavits to the Forest Service at any stage of the proceeding, and each of whom has lengthy, multi-faceted and highly technical criticisms of the plan. An examination of the affidavits and reports of these experts reveals that the breadth and scope of their criticisms and the evidence which the defendants would likely introduce to rebut them would, if the Court permitted them to testify, transform this case into a de novo hearing on the merits of the plan. This would effectively reopen the planning process and put the Court in the role of the Forest Planner, a role which it

has neither the resources nor the expertise to perform. See Cronin v. United States Department of Agriculture, 919 F.2d 439, 444 (7th Cir. 1990).

These plaintiffs are not unsophisticated litigants. They have significant resources and considerable expertise in environmental litigation. They have certainly known all along where to go to obtain the kind of evidence they now seek to offer for the first time in this Court. While it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon those who have objections to structure their participation in the administrative process so that it is meaningful, so that it alerts the agency to their position and contentions. Vermont Yankee, 435 U.S. at 553. To wait years to offer voluminous objections by an army of experts borders on the kind of gamesmanship condemned by the Supreme Court. Id.

Defendants' motion in limine to limit review to the administrative record is well taken and is **GRANTED**.

IT IS SO ORDERED.

/s/ James L. Graham
JAMES L. GRAHAM, JUDGE
United States District

APPENDIX D

United States Department of Agriculture | Forest Service | Washington Office | 14th & Independence SW
P.O. Box 96090
Washington, DC 20090-6090

Reply To: 1570-1(LMP)

Date: November 14, 1990

CERTIFIED RECEIPT REQUESTED

Jerome C. Tinianow
Hahn Loeser & Parks
800 National City E. 6th Building
1965 East 6th Street
Cleveland, Ohio 44114-2262

RE: Appeal of the Wayne National Forest Land and Resource Management Plan (#2309)

Dear Mr. Tinianow:

Pursuant to 36 CFR 211.18, this letter is our final decision on your appeal of the Wayne National Forest Land and Resource Management Plan (Forest Plan/Plan) and its accompanying Final Environmental Impact Statement (FEIS).

You are representing the Sierra Club, Ohio Chapter who are the appellants. Intervenors are: the American Motorcyclist Association; the Little Muskingum Watershed Association; the Appalachian Mother Earth Network; Dale W. Riddle Forest Products, Inc.; Waldron Lumber Company, Inc.; The Ohio Forestry Association, Inc.; the National Wild Turkey Federation, Inc., Ohio State Chapter; the Ruffed Grouse Society; the Southeaster Ohio Oil and Gas Association; the

Ohio Chapter of the Wildlife Society; the Mead Corporation; and Gary L. and Laurel L. Hamilton.

The allegations in your appeal are: 1) "The Plan permits unjustified timber sales below cost, thereby allowing timber harvesting on lands which are not suitable for this activity"; 2) "The Plan perverts statutory and regulatory requirements pertaining to biological diversity by using them to justify creation of conditions that are common outside of the Forest, in favor of conditions which are available mainly or even exclusively in the Forest"; 3) "The Forest Plan allows clearcutting on 80% of the suitable timber land without demonstrating that it is the optimal method of timber harvest"; and 4) "The adjustments to the Plan needed to correct the errors identified above will require additional adjustments in other areas of the Plan."

You appealed the plan "based on a number of errors" with a request that "the Plan be remanded to the Regional Forester with instructions to redraft it to eliminate these errors." "[T]he result is a Plan which provides for too much timber harvesting, in too large an area, by the wrong methods, at too low a price" (SOR, page 2).

ISSUE 1 - WHETHER THE FOREST PLAN ALLOWS UNJUSTIFIED BELOW COST TIMBER SALES.

In the SOR (page 6), the appellants contend that the inclusion of below-cost timber sales is a violation of section 6(k) of NFMA and/or the MacCleery decision and therefore ". . . will allow timber harvest on unsuitable land in violation of the law. You further state "[T]he Regional Forester's reliance on intangible benefits to establish the economic viability of including certain lands in the timber base is particularly objectionable" (SOR page 8).

Discussion:

Below-cost timber sales has become an item of considerable debate. However, most arguments tend to ignore the fact that the Forest Service is required by law to manage the Forest for multiple uses. In managing timber, as one of the multiple uses, we must insure that we are cost effective in our management practices but this does not necessarily equate with making a profit. In Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985), the Ninth Circuit Court rejected the argument that timber can only be harvested where the value of the timber exceeds the cost of the harvest.

The requirements for identification of lands which are not suitable for timber production are contained in the implementing regulations of 36 CFR 219.14(a) through (d). The suitability process consists of three stages as described by these regulations. The result of this analysis by the Wayne National Forest is displayed by alternative in the Draft Environmental Impact Statement (DEIS), Appendix B, part 3 (table B3-9 and pages B3-39) and the FEIS page 1-11. The intent of the first stage of this procedure is to ensure that timber production will not be attempted where it might cause irreversible resource damage or deforestation. The intent of the second and third stages of this procedure in to ensure that land is selected for timber production in such way that the multiple-use goals and objectives of the LRMP are achieved in the most cost-efficient manner possible.

The results of the analysis show that the amount of land classified as suitable timber land ranges from 17,878 acres in Alternative 7 to 147,742 acres in Alternative 6. Modified Alternative 3 (the Forest plan) has 126,107 acres identified as suitable for timber production. The process used by the Forest

to determine lands suitable for timber production is consistent with 36 CFR 219.14 and NFMA.

The appeal record shows that cost efficiency was considered throughout the planning process (FEIS appendix B). This analysis is done by alternative for the entire Forest, not for each individual timber sale that will follow. The regulation at CFR 219.3 defines "cost efficiency" as "[T]he usefulness of specified inputs (costs) to produce specified outputs (benefits). In measuring cost efficiency, some outputs, including environmental, economic, or social impacts, are not assigned monetary values but are achieved at specified levels in the least cost manner." Therefore, "cost efficiency" takes into account both priced and non-priced (or intangible) values.

The present net value (PNV) is a primary economic criterion used by the Regional Forester to compare economic efficiency of alternatives. However, PNV does not measure the nonpriced benefits of Forest management.

The Regional Forester is not required to select an alternative with the highest PNV. The NFMA regulation (36 CRF 219.1) prescribes that the Forest Plan shall prescribe management which will maximize long-term public benefits in an environmentally sound manner.

Although the appellants find ". . . the Regional Forester's reliance on intangible benefits to establish the economic viability of including certain lands in the timber base objectionable," the determination of which alternative has the highest net public benefit derived from the array of alternatives included in the analysis. The Regional Forester recognizes that below-cost sales may occur under the provisions of the Forest Plan (DEIS, Page 2-85 through 87; FEIS, pages 2-18 through 19; ROD, Pages 20-21) and discusses efforts to cut

costs and raise revenues in order to reduce the incidence of below-cost sales.

During implementation of the Forest Plan, the costs and benefits of different ways to carry out timber sales are evaluated on a sale-by-sale basis. For each proposed sale, a no action alternative, which has no timber harvesting, is also considered. Specific information related to current timber prices as well as the costs of timber harvesting are available to support judgements about the practicality of specific timber sale proposals and to support final decisions of whether or not to proceed with specific timber sales. You have opportunities to be involved in these decisions and to appeal them if you disagree.

Appellants cite the decision letter of July 31, 1985, by the Deputy Assistant Secretary of Agriculture on the appeals of the Grand Mesa, Uncompahgre, and Gunnison (GMUG) National Forests and the San Juan National Forest (Secretary's decision), contending that the "Decision" (ROD) is inadequate because it does not provide in appropriate detail the Justification for a proposed timber program where costs are projected to exceed receipts.

In general, our policy is that the ROD for the Forest Plan must explain why the alternative selected to become the Forest Plan will come closer to maximizing net public benefits than other alternatives considered in the FEIS. The alternative that maximizes net public benefits may provide for a timber sale program in which projected timber sale revenues are less than the projected costs of carrying out the sales. In such cases, the ROD must explain why the projected nonrevenue benefits are believed to balance the projected costs.

In his determination that Alternative 3 maximizes net public benefits, the Regional Forester (ROD, page 4) states that "[I]n making the decision, a determination of net public benefits cannot be reduced to any kind of single index for comparison of the Alternatives. Benefits, costs, and other environmental effects were considered in combination. Public preferences expressed as issues and concerns and in comments on the DEIS received particular consideration in the decision making process." The Regional Forester's rationale for selecting Alternative 3 as the one that, in his judgement, best meets the net public benefits is contained in the ROD (pages 7-24). The Regional Forester goes on to state "[w]hile some management practices in the Forest Plan do not have the lowest cost, these practices do contribute to a greater overall net public benefit. These benefits include providing a broad range of dispersed recreation opportunities, enhancing scenery, and improving the quality of wildlife habitat" (ROD, page 29).

Conclusion

In reviewing the record with respect to below-cost sales, we conclude that the timber sale program has multiple objectives, will not attempt to offer timber volumes in excess of actual timber demand, and recognizes the need to reduce program costs while still providing an appropriate level of nontimber multiple-use objectives. Although timber costs are projected to exceed timber revenues for the planning horizon (DEIS, table 2-33, page 2-83), the Forest Plan proposes a decrease in the timber program from 8.1 million board feet per year (MMBF/Yr), the average volume sold for the last ten years (1978-1987), to 7.5 MMBF/Yr. Even though the Regional Forester chose an alternative that allowed for below-cost timber sales, the record (ROD) shows he fully considered this issue.

We find that the Forest's cost efficiency analysis was not a departure from required procedures and was not arbitrary or capricious. The Regional Forester properly developed the decision in the ROD and the analysis conducted in the FEIS is consistent with the requirements of the Secretary's decision. The Regional Forester is affirmed.

Issue 2 - WHETHER THE FOREST PLAN COMPLIES WITH STATUTORY AND REGULATORY REQUIREMENTS PERTAINING TO DIVERSITY

You contend that it is not appropriate to justify clearcutting in a large part based on the need to preserve biological diversity. "[R]ather, forested land in the Wayne is far more "suitable" to the provision of habitat which is rare in the surrounding area, namely, old growth." The appellants maintain that clearcutting will only add additional early successional habitat that is commonly found on private lands surrounding the forest (SOR, page 10).

In response to this contention, the Regional Forester points out that changes were made between the DEIS and Final Plan to give more emphasis to large continuous forest tracts of old-growth forest and provide more large, unbroken areas of mature and overmature hardwoods (RS, page 14). It is recognized in the FEIS ". . . that the Wayne offers an opportunity to develops some relatively large areas of continuous, public old-growth forest in Ohio which will provide unique recreation opportunity, add to Forest biological diversity, provide important habitat for forest interior wildlife species, and contribute to the local economy" (FEIS, page 2-27).

The planning regulations require coordination of the Forest planning effort with other State and Federal agencies, State and

local governments, and Indian tribes (36 CFR 219.7). The regulations also require coordination to the extent practicable with owners of lands that are intermingled with, or dependent for access upon, National Forest System lands. (36 CFR 219.6). In reviewing the record we find that, based on public comment and comments specifically from agencies such as described above, consideration was given in the planning process to activities on surrounding lands (FEIS, pages 2-22 thru 2-29) (ROD, pages, 24 and 25).

While Forests are required to consider and be cognizant of conditions on adjacent lands under other agency administration and other ownerships, NFMA does not require our planning and proposed management to defer to those conditions. The Forest Service enjoys broad discretion in establishing Forest Plan direction to achieve its statutory mission of multiple-use, sustained yield management of the National Forest System. The Forest Plan establishes the overall goals and objectives for the management of the land and resources of a Forest. It is during forest plan implementation that the conditions on National forest and other public lands as well as private lands are evaluated to assess cumulative effects as part of the NEPA site-specific analysis required for project and activity level decisions.

The Forest Plan must provide for diversity of plant and animal communities consistent with the multiple-use objectives of the planning area, which in this case is the National Forest. The laws and regulations do not specify a particular level or ratio (balance) of multiple uses a National Forest must maintain. Forest planning regulations provide that the interdisciplinary team shall consider how the plant and animal communities and species will be affected by various mixes of resource outputs and uses (36 CFR 219.3 and 219.26). The regulations

establish no additional requirements for diversity beyond those identified for management indicator species, population viability of sensitive specifies, recovery of threatened or endangered species of plants and animals, and protection of special habitats.

The Record of Decision (Page 17) states that "[t]he criteria for choosing a particular silvicultural system and harvest method are based upon the desired future land condition, wildlife populations, vegetative diversity, visual quality objectives, economics, timber products demand and recreational use." Even-aged timber management (clearcutting) obviously changes the forest environment and favors some plant and animal species over others. However, the appellants have not shown that the amount, timing, location, and standards for even-aged timber harvesting is the Wayne Forest Plan will have adverse effects on the abundance and distribution of plant and animal species. The Forest responded to public comment about old growth in the DEIS by increasing in the Forest Plan the amount of old growth for wildlife habitat, ecosystem diversity, and preservation for recreation and aesthetic reasons.

Conclusion

We find that the Wayne Forest Plan provides for diversity in accordance with the requirements of the NFMA and the planning regulations. The Regional Forester is affirmed.

ISSUE 3 - WHETHER THE FOREST PLAN HAS DEMONSTRATED THAT CLEARCUTTING IS THE OPTIMUM METHOD.

Appellants contend that the Forest Plan fails to support even-aged management (clearcutting) as the optimum method in violation of applicable laws and regulations.

Before addressing this specific issue, it is important to understand the decisions that are made in the Forest Plan and those decisions that are made during implementation of the Plan.

It is important to understand that the Forest Plan represents only one level in decisionmaking about the management of the Wayne National Forest and that final decisions are yet to be made on many matters of evident concern to the appellants.

The Forest Plan establishes a broad programmatic management system for the Wayne National Forest. It sets goals for National Forest management and a set of standard and guidelines to follow in pursuit of those goals. It identifies land that is suitable for timber harvest on a Forest-wide basis. It establishes a monitoring process to help determine how well the standards and guidelines are working and whether the goals remain appropriate during the period when the Forest Plan is implemented.

The Forest Plan identifies, through the management prescriptions, the desired future condition of the Forest and sets the stage for project or activity review, but does not provide the last word. Forest Plans are not a collection of individual project decisions which create irretrievable commitments of resources. Such Plans would inhibit use of new information, response to changes in demands and needs, adoption of new technology, and response to evidence from monitoring. It is during Forest Plan implementation that we determine management practices to meet overall goals and objectives consistent with the Plans standard and guidelines. Decisions at the project planning level and the Forest Plan monitoring and evaluation processes provide for regular reviews to ensure validity of planning assumptions.

In the case of the Wayne National Forest Land and Resource Management Plan, Appendix C includes a thorough discussion of harvest methods that are considered for use and demonstrates that even-aged management, primarily clearcutting, is the method usually most suited to meeting alternative objectives in the forest types common to the Wayne National Forest. However, the Regional Forester in his Responsive Statement (page 16) states that "(t)he Forest Plan has established a programmatic system for future management decision making. The silvicultural systems chosen in the Forest Plan do not constitute a decision to take action on the ground. Those decisions are made for individual site-specific [projects] when implementing a Forest Plan."

Conclusion.

The Regional Forester is affirmed. The optimality determination in the Wayne Forest Plan is appropriate as programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain areas of the forest to achieve specific management objectives. However the analysis and final decision on the appropriateness of even-aged management, or the optimality of clearcutting, must be made as a site-specific determination at the project level during Forest Plan implementation and must follow National Environmental Policy Act procedures.

DECISION

The Regional Forester is affirmed. Based on our review of the record, we conclude that the Regional Forester has looked at all sides of the issues relating to timber harvest and vegetation management. We find no basis for changing his decision. Further, we have concluded that there are adequate requirements for further analysis provided during

implementation of the Wayne National Forest Land and Resource Management Plan to ensure proper harvest methods are evaluated in meeting management objectives for wildlife and other resources. The requirements include site-specific environmental analysis, with consideration of cumulative effects and a no action alternative; proper public notification of the intended action; and another point of appeal afforded the public (see 36 CFR 217) as a decision to act is made.

Thank you for your interest, and we hope that you will continue to participate in the management of the Wayne National Forest. While the Regional Forester used the best information available at the time in developing the Forest Plan, there is a continuing need to evaluate original assumptions as new information becomes available. The forest planning, monitoring, and evaluation process provides for regular reviews to ensure validity of planning assumptions. We are committed to making appropriate changes in the Forest Plan whenever necessary. The planning process is designed to be responsive to changing information, conditions, or demand (36 CFR 219.10 (f) and (g)). This is an ongoing commitment, and we will need assistance and advice from you and others to reach this goal.

This is the final administrative decision by the Department of Agriculture, unless the Secretary, on his own initiative, elects to review the decision within 10 days of receipt (36 CFR 211.18(f)).

Sincerely,

/s/David G. Unger
DAVID G. UNGER
Reviewing Officer for the Chief

APPENDIX E

United States Department of Agriculture | Forest Service | Washington Office | 14th & Independence SW
P.O. Box 96090
Washington, D.C. 20090-6090

Reply To: 1570-1 (LMP)

Date: 14 Jan 1992

CERTIFIED RECEIPT REQUESTED

Mr. Everett Hewlett
Citizens' Council on Conservation
and Environmental Control
P.O. Box 10841
New Marshfield, Ohio 45766

RE: Appeal of the Wayne National Forest Land and Resource Management Plan (#2313)

Dear Mr. Hewlett:

This is our decision on the appeal of the Wayne National Forest Land and Resource Management Plan (Forest Plan or LRMP) which was filed on behalf of the Citizens' Council on Conservation and Environmental Control. We conducted our review pursuant to the provisions of the appeal regulations at 36 CFR 211. This is the final decision of the Department of Agriculture on your appeal unless the Secretary, acting on his own initiative, elects to review it within 10 days of receipt.

There are 10 intervenors: The American Motorcyclist Association, the Little Muskingum Watershed Association, the Appalachian Mother Earth Network, the Ohio Forestry

Association, Dale W. Riddle Forest Products, Inc., Waldron Lumber Co., Inc., Mead Corporation, Ruffed Grouse Society, Southeastern Oil and Gas Association, and the Ohio Chapter of the Wildlife Society. Comments were received for the record from Ohio University Ecology Club and other individuals.

On January 4, 1988, Regional Forester for the Eastern Region Floyd J. Marita signed the Record of Decision (ROD) approving the Forest Plan for the Wayne National Forest. On January 4, 1988, you appealed that decision. No stay was granted in conjunction with your appeal. Your appeal was filed under appeal regulations 36 CFR 211.18.

Summary of Decision

Based on our review of the record, and for the reasons discussed in the enclosed decision on appeal #2313, it is our decision to affirm the Regional Forester's decision to approve the Forest Plan. Although we deny the relief requested (that the Land and Resource Management Plan and Final Environmental Impact Statement be re-submitted in a draft) appellants will have the opportunity to participate in project level decisions, monitoring, evaluation, amendment, and revision of the Forest Plan.

While the Regional Forester used the best information available at the time in developing the Forest Plan, there is a continuing need to evaluate original assumptions as new information becomes available. The Forest planning, monitoring, and evaluation process provides for regular reviews to ensure validity of planning assumptions. We are committed to making appropriate changes in the Forest Plan whenever necessary. The planning process is designed to be responsive to changing information, conditions, or demands

(36 CFR 219.10(f) and (g). This is an ongoing commitment, and we will need assistance and advice from you and others to reach this goal.

Throughout this decision we have explained that many of your concerns have to do with project level decisionmaking. That a Forest Plan allows decisions to be made to implement projects does not mean that all possible projects consistent with the Forest Plan will go forward. In affirming the Regional Forester's approval of the Forest Plan we do not make any judgment on individual project decisions. We expect appellants to make their concerns known as projects are proposed and decided upon.

During Forest Plan implementation, in accordance with applicable regulations and Agency directives, the Regional Forester will ensure that appropriate site-specific analysis will occur at a time when a project proposal is sufficiently defined to enable full consideration of the environmental consequences. Appellants will have an opportunity to participate in project decisions, including the right of administrative appeal.

Sincerely,

/s/David G. Unger
DAVID G. UNGER
Reviewing Officer for the Chief

Enclosure

APPEAL DECISION

WAYNE NATIONAL FOREST
LAND AND RESOURCE MANAGEMENT PLAN

APPEAL #2313

DAVID G. UNGER
Reviewing Officer for the Chief

/s/ David G. Unger

Date: 1/10/92

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Decision
Wayne National Forest
Land and Resource Management Plan
Appeal # 2313

Summary of Decision

Based on our review of the record, and for the reasons discussed below, we affirm the Regional Forester's decision to approve the Wayne Forest Plan. Although we deny the relief requested (that the Land and Resource Management Plan and Final Environmental Impact Statement be re-submitted in a draft) appellants will have the opportunity to participate in project level decisions, monitoring, evaluation, amendment, and revision of the Forest Plan.

While the Regional Forester used the best information available at the time in developing the Forest Plan, there is a continuing need to evaluate original assumptions as new information becomes available. The Forest planning, monitoring, and evaluation process provides for regular reviews to ensure validity of planning assumptions. We are committed to making appropriate changes in the Forest Plan whenever necessary. The planning process is designed to be responsive to changing information, conditions, or demands (36 CFR 219.10(f) and (g)). This is an ongoing commitment, and we will need assistance and advice from you and others to reach this goal.

Throughout this decision we have explained that many of your concerns have to do with project level decisionmaking. That a Forest Plan allows decisions to be made to implement projects does not mean that all possible projects consistent with the Forest Plan will go forward. In affirming the Regional Forester's approval of the Forest Plan we do not make any

judgment on individual project decisions. We expect appellants to make their concerns known as projects are proposed and decided upon.

During Forest Plan implementation, in accordance with applicable regulations and Agency directives, the Regional Forester will ensure that appropriate site-specific analysis will occur at a time when a project proposal is sufficiently defined to enable full consideration of the environmental consequences. Appellants will have an opportunity to participate in project decisions, including the right of administrative appeal.

Procedural History

Regional Forester for the Eastern Region Floyd J. Marita signed the Record of Decision (ROD) approving the Forest Plan for the Wayne National Forest on January 4, 1988. Appellants filed a Notice of Appeal (NOA) and request for oral presentation on January 4, 1988, and filed a Statement of Reasons (SOR) on April 19, 1988. On May 4, 1989, the Regional Forester sent a Responsive Statement (RS) to appellants and they filed a reply to it (RRS) on May 27, 1989. Intervenor Appalachian Mother Earth Network requested a stay of decision on June 12, 1989, which was denied on June 28, 1989. The Appeal Record was sent to the Chief for review on July 28, 1989. Appellants waived the opportunity for an oral presentation. The Record is now closed.

Issues

We have identified the following issues in your SOR.

1. Whether the timber program in the Wayne Forest Plan complies with the National Forest Management Act (NFMA), Forest Service Policy, Department Policy, and the National Environmental Policy Act (NEPA).

2. Whether the Wayne Forest Plan violates NEPA.

3. Whether the Forest Plan is based on an adequate assessment of wildlife diversity.

4. Whether the Forest Plan Adequately Protects Water Quality.

5. Whether the Forest Plan Violates NFMA and 36 CFR 219.21 with respect to Recreation.

6. Whether the Forest Plan's assessment of The Visual Resource violates NFMA and implementing regulations.

7. Whether the Forest Plan respects the cultural resource represented by the Wayne National Forest.

Relief Requested

As relief, the appellants request that the Forest resubmit the Forest Plan "in a draft which provides for the public benefit and legally required protection of Forest resources and environment as outlined in the environmentally preferred alternative, number seven." In addition, you request numerous specific changes in the Plan for each of the areas of concern in your appeal (SOR, pages 97-101).

The intervenors, on the other hand (except for the Appalachian Mother Earth Network), support the ROD and maintain the FEIS is adequate and correct. They maintain that the restrictions imposed and agreements worked out with the Forest in response to comments received on the Draft Environmental Impact Statement will preserve and protect important resources. The intervenors believe that the Plan provides for a balanced management of all resources which will continue to maintain the employment base, and that the tax

income and service industry spin-off will create and maintain a healthy local economy.

The intervenor the Appalachian Mother Earth Network is in full agreement with the appellants' NOA and SOR and, like the appellants, request that the Forest Plan be remanded.

We have characterized your contentions as seven separate issues. The Regional Forester's RS provided a thorough and complete response to many of your specific concerns, and our review focuses on the key elements of each issue to reach a conclusion. Our analysis of these issues follows a discussion of the role of Forest Plans. It is within the context of the role of the Forest Plan in the Forest Service decision process that the appellants's contentions will be addressed.

ROLE OF THE FOREST PLAN

It is important to understand that the Forest Plan represents only one level in decisionmaking about the management of the Wayne National Forest and that final decisions are yet to be made on many matters of evident concern to appellants.

The Forest Plan establishes a broad programmatic management system for the Wayne National Forest. It sets general and specific goals for National Forest management and a set of standards and guidelines to follow in pursuit of those goals. It identifies land that is suitable for timber production and determines the allowable sale quantity (ASQ) and associated sale schedule. It establishes a monitoring process to help determine how well the standards and guidelines are working and whether the goals remain appropriate during the period when the Forest Plan is implemented.

The Forest Plan establishes the desired future condition of the Forest and sets the stage for project or activity review, but

does not provide the last word. Project and activity level decisions are made in the Forest Plan only if they are specifically identified in the Record of Decision and Forest Plan and are sufficiently analyzed to meet National Environmental Policy Act (NEPA) requirements in the FEIS.

The Wayne Forest Plan is not a simple collection of projects to be carried out during the life of the Forest Plan. To implement the Forest Plan, specific projects will be proposed and evaluated before final decisions are made. The evaluation will include whatever additional environmental analysis is needed to comply fully with the National Environmental Policy Act (NEPA) and other environmental laws and regulations. The public will have opportunities to be involved in decisions about these projects and to appeal these decisions.

As a part of the Forest Plan and FEIS development, the Forest Service must address the various Federal environmental laws. The basic approach is to then use Forest Plan management direction as a gateway to compliance with these environmental laws at the project and activity level.

Analysis of Issues

Issue 1. Whether the timber program in the Wayne Forest Plan complies with the National Forest Management Act (NFMA), Forest Service Policy, Department Policy, and the National Environmental Policy Act (NEPA).

Appellants contend "the Forest Service has not demonstrated that their timber program can be cost-effective. The Forest Service has not performed a rigorous analysis of the individual sites to be harvested and as a result, the assumptions which the plan makes over the supposed benefits simply are not

supported by measurable, empirical data and facts" (SOR, page 3). To support this contention, it is argued that:

A. The plan fails to set forth an appropriate explanation of below-cost timber sales. "The broad discretion the Forest Service has exercised in the mismanagement of the Wayne does not extend to ignoring the requirement that each timber sale be cost effective and not below cost" (SOR, page 5). The Forest Service policy of allowing below cost sales is a "violation of existent" law (SOR, page 7).

B. The inclusion of below-cost timber sales is a violation of section 6(k) of the NFMA and/or the MacCleery decision and as a result allows timber harvest on unsuitable land in violation of the law (SOR pages 6-32). Further, the regulations dealing with suitability do not conform with Congress's intent as expressed in 16 USC Section 1604 (k): First, . . . "by allowing other factors, in some cases, to force harvesting on lands where the costs of timbering exceed the revenues to be derived therefrom, these regulations ignore the primary intent of Section 6 (k); i.e., to prevent timbering on economically unsuitable land" (SOR, page 18). Secondly, . . . "the suitability regulations fail because the definition of 'cost efficient' does not reflect the intent of Section 6 (k)" (SOR, page 23). Third, . . . "the suitability regulations are deficient because they do not require site-specific evaluation of economic factors related to timbering" (SOR, page 26).

C. The Forest Plan fails to support even-aged management (clearcutting) as the optimum method of harvest in violation of Section 6(g)(3)(F) of the NFMA and Section 102 of NEPA (SOR, page 36).

D. The Forest Plan violates NFMA by virtue of not being able to sustain the timber harvest level called for in the Plan (SOR, page 47).

A. Below-cost Sales.

Below-cost timber sales have become an item of considerable debate. However, most arguments tend to ignore the fact that the Forest Service is required by law to manage the Forest for multiple uses. In managing timber as one of the multiple uses we must insure that we are cost effective in our management practices. Cost effectiveness, however, does not necessarily equate with making a profit. In Thomas v. Peterson, 735 F.2d 754 (9th Cir. 1985), the Ninth Circuit Court rejected the argument that timber may only be harvested where the value of the timber exceeds the cost of the harvest.

The appeal record shows that cost efficiency was considered throughout the planning process (FEIS appendix B). The cost efficiency analysis is done by alternative for the entire Forest, not for each individual timber sale that will follow. Although the appellants assert that cost efficiency analysis should have been done for "actual harvest sites," such specificity is appropriately left to subsequent project planning when harvest sites are selected, which is a separate and distinct level of decisionmaking from the decision to approve a Forest Plan.

The regulation at CFR 219.3 defines "cost efficiency" as "[t]he usefulness of specified inputs (costs) to produce specified outputs (benefits). In measuring cost efficiency, some outputs, including environmental, economic, or social impacts, are not assigned monetary values but are achieved at specified levels in the least cost manner." Therefore, "cost efficiency" takes into account both priced and non-priced values.

In reviewing the record with respect to below-cost sales, we conclude that the timber sale program has multiple objectives such as providing a variety of recreational experiences, and services to the public while assuring protection of soil, water, visual, and cultural resources (ROD pages 3, 6, 20 and 21); that the Forest will not attempt to offer timber volumes in excess of actual timber demand (Forest Plan, page 2-5; ROD, page 19); and that the Forest recognizes the need to reduce program costs while still providing an appropriate level of nontimber multiple-use objectives (ROD, page 20). The Regional Forester recognizes that below-cost sales may occur under the provisions of the LRMP (DEIS, pages 2-85 through 2-87; FEIS, pages 2-18 and 19; ROD, pages 20-21), provides an explanation of why he believes that the LRMP will maximize net public benefits (ROD, pages 4-7) and discusses efforts to cut costs and raise revenues in order to reduce the incidence of below-cost sales (ROD, pages 26-30).[1] Although timber costs are projected to exceed timber revenues for the planning horizon (DEIS, table 2-33, page 2-82), the timber sale program proposed for the first decade does not represent an increase over recently experienced levels.

The rationale for conducting these sales and the factors affecting the cost efficiency of using the timber program to achieve non-timber benefits are discussed in the DEIS (pages 2-77 through 2-87) and the ROD (pages 20-21 and 26-29).

---

[1] Throughout the decision the DEIS is cited. Although usually a FEIS totally supersedes the DEIS, the FEIS for the Wayne National Forest is "abbreviated" and incorporates the information of the DEIS. The DEIS therefore contains large portions of the final NEPA documentation and is cited as such throughout this decision.

Conclusion

The Regional Forester is affirmed. We find no reason to amend the Forest Plan with respect to below-cost sales. Although you disagree with the criterion used to approve the plan, the record substantiates that the Regional Forester acted properly in arriving at the decision. Even though the Regional Forester chose an alternative that allowed for below-cost timber sales, the record (ROD) shows he fully considered this issue, and made a decision that was reasonable and consistent with legal requirements.

B. Suitability Determination and the MacCleery Decision

This contention has two aspects. The first is whether or not the planning regulations on suitability (36 CFR 219.14) comply with Section 6(k) of the National Forest Management Act (NFMA). The second is whether or not the Wayne National Forest followed the procedures established by the regulations.

The appellants' assertion that the process in the planning regulations for determining suitability is per se in violation of NFMA is not an appealable issue. Only decisions by Forest Officers are subject to appeal under 36 CFR 211.18. The NFMA regulations were promulgated by the Secretary of Agriculture and thus not subject to appeal.

Moreover, contrary to the appellants's assertion, NFMA does not require land management plans to identify lands unsuitable for timber production based on an absolute standard of economic returns to timber management alone (SOR, page 23). Economic efficiency is identified by NFMA as one of several factors influencing the suitability determination (16 USC 1604 (k)). As part of this determination, alternative timber

management prescriptions are developed for individual timber stands, and their costs and returns are calculated and compared. Investments in timber management, however, often produce benefits for other resources and highly productive timberland may have attributes desired for other resource uses as well. The determination of suitable lands must take into account the interrelationships among timber and non-timber resources and among the various geographic areas in the Forest in achieving a desired mix of goods and services from the entire Forest. Therefore, the natural and practical place to make the determination of the land's suitability for timber production is when Forest-wide alternatives (each reflecting a different mix of goods and services) are developed for the Forest Plan. The process in 36 CFR 219.14 for determining suitability ensures that land is selected for timber management in such a way that the multiple-use goals and objectives of the Forest Plan are achieved in the most cost-efficient manner possible.

The appellants assert that the economic and environmental evaluation of land suitability must be done on a site-specific basis. The Responsive Statement provides cross-references to the DEIS to show how site characteristics were used to evaluate direct costs and benefits of timber harvesting and to develop the timber management prescriptions for the comparison of costs and returns (RS, pages 10-13). Although the appellants maintains that site-specific characteristics should have been analyzed for "each harvest area" (SOR, page 13) rather than analysis areas, this level of specificity is appropriately left to subsequent project planning when harvest sites are selected.

As we explained earlier in this decision, the Forest Plan is a programmatic document which identifies factors that the Forest

Service will consider in making future decisions. Unless it specifically provides otherwise, the Forest Plan does not commit the agency to undertake any ground disturbing projects. It set forth guidelines, prescriptions, and standards to govern site-specific projects such as individual timber sales.

It is during the implementation of Forest Plans that costs and benefits of alternative methods to carry out timber sales are evaluated on an individual sale basis. For each proposed sale, a no action alternative, which has no timber harvesting, is also considered. Specific information related to current timber prices as well as the costs of timber harvesting are available to support judgments about the practicality of specific timber sale proposals and to support final decisions of whether or not to proceed with specific timber sales.

The appellants also contend that the Wayne Forest Plan justifies a costly timber harvest and road building program as a means to achieve recreation and wildlife benefits that are not needed. "The Final Plan does not address adequately the need for the purported multiple use benefits to be derived from timbering" (SOR, page 33). "By adhering to imposed goals for timbering without conducting an economic analysis of alternative goal formulations, the final plan violated Department of Agriculture policy, as contained in the MacCleery Decision" (SOR, page 34).

The MacCleery decision stated the principle that:

> A particularly strong obligation is imposed on the Forest Service to explain the economic, social and environmental tradeoffs which are likely to occur when resource objectives or responses to public issues are proposed which would reduce economic efficiency (reduce present net value). (USDA Deputy Assistant Secretary's Decision on Review of Administrative

> Decision by the Chief of the Forest Service Related to the Administrative Appeals of the Forest plans and EISs for the San Juan National Forest and the Grand Mesa, Uncompahgre, and Gunnison National Forest, July 31, 1985, page 6.)

The situation on the Forests that gave rise to the MacCleery decision was the expansion of a timber program where the direct costs associated with increasing timber sales above recent sale levels exceeded the expected revenues over the entire planning horizon (the overall time period considered in the planning process which in this case is 50 years). In the case of the Wayne National Forest, however, the timber sale program proposed for the first decade does not represent an increase over recently experienced levels. The benchmark analyses in the DEIS indicate that allowing timber harvests to expand to meet timber demands would increase present net value over the 50-year planning horizon (DEIS, page 2-78, page B6-42). The maximum PNV (present net value) Benchmark, Alternatives 1, 2, and 6 all have a higher PNV than the preferred alternative (which became the Plan). Alternatives 1 and 6 also display higher levels of timber harvest than the preferred alternative. The Regional Forester explains the tradeoffs in present net value that were accepted in order to develop a Forest Plan that was more responsive to public desires for non-priced benefits (ROD, page 29).

The timber sales program in the Wayne Forest Plan does not fit the factual situation addressed by the MacCleery decision. The Regional Forester acknowledges, however, that in some proposed sales the cost of accessing and preparing timber sales will exceed receipts (ROD, page 21). The rationale for conducting these sales and the factors affecting the cost efficiency of using the timber program to achieve non-timber benefits are discussed in the DEIS (pages, 2-85 to 2-87) and

the Regional Forester's responsive statement (pages, 5-7). These discussions address many of the factors noted in the MacCleery decision, including initiatives to lower the cost of timber harvesting, the relative efficiency of alternative vegetation management techniques, and the need to use timber harvesting to achieve non-timber management objectives.

We now turn to the second aspect of the issue and examine whether the Wayne National Forest followed the procedures established by the regulations. The suitability procedures are described in the planning regulations in paragraphs 219.14(a) through 219.14(d).

The appellants allege that the procedures used by the Wayne National Forest to determine the suitability of lands for timber production are driven by the need to meet predetermined timber production goals and will allow large areas of physically and economically unsuitable lands to be included in the timber base. Noting the steep slopes of the Wayne National Forest, the appellants state that the Forest Service has not adequately justified classifying only 1,160 acres as physically unsuitable (SOR, pages 27-28).

The record shows that the Wayne National Forest completed all three stages. The Forest's description of the suitability process is found in the DEIS (page 2/75; 4/58; Appendix B, pages 3/37-39). The general process used for formulating alternatives is contained on page 2-1 of the DEIS.

The criteria applied by Forest planners to identify lands with physical or environmental limitations for timber production are shown in Appendix B (pages B3-37 to B3-39) of the DEIS, and the Land Classification Summary (Plan, chapter 4, page 7). The Regional Forester, in his Responsive Statement, provides a cross reference from planning documents on the

physical suitability analysis conducted as part of the Forest planning process (RS, pages 10-12). With the information developed through the physical suitability analysis, criteria were developed by an interdisciplinary team of resource specialists based on years of experience on the Wayne National Forest and available research. The criteria included topography, soil characteristics, and other physical features of the Forest. Our review of the record indicates that Forest planners considered the problems associated with timber harvesting on steep slopes and applied reasonable criteria to determine which lands were unsuitable for timber production. Based on their evaluation, they excluded some lands from timber management and provided specific standards and guidelines to protect other areas.

Conclusion

The Regional Forester is affirmed. The process used to determine lands suitable for timber production on the Wayne National Forest is consistent with the requirements of 36 CFR 219.14.

C. Even-aged Versus Uneven-aged Management

The appellants charge that the Wayne Forest Plan fails to support clearcutting as the optimum method of harvest in violation of applicable laws and regulations (SOR, page 36).

As previously discussed, the Forest Plan identifies through the management prescriptions the desired future condition of the Forest and sets the stage for project or activity review, but does not provide the last word. Forest Plans are not a collection of individual project decisions which create irretrievable commitments of resources. Such Plans would inhibit use of new information, responses to changes in demands and needs, adoption of new technology, and response

to evidence from monitoring. It is during Forest Plan implementation that we determine management practices to meet overall goals and objectives consistent with the Plan's standards and guidelines. Decisions at the project planning level and the Forest Plan monitoring and evaluation processes provide for regular reviews to ensure validity of planning assumptions.

The Wayne Forest Plan, Appendix C includes a thorough discussion of harvest methods that are considered for use and demonstrates that even-aged management, primarily clearcutting, is the method usually most suited to meeting alternative objectives in the Forest types common to the Wayne National Forest. However, the Regional Forester in his Responsive Statement (pages, 17-19) says that . . . "the Forest Plan has established a programmatic system for future management decision making and that the silvicultural systems chosen in the Forest Plan do not constitute a decision to take action on the ground. Those decisions are made for individual site-specific [projects] when implementing a Forest Plan." Site-specific determinations at the project level must be made with public involvement and documented in accordance with NEPA procedures. These decisions are subject to administrative appeal.

The optimality determination in the Wayne Forest Plan is appropriate as programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain areas of the Forest to achieve specific management objectives. The Forest Service Land and Resource Management Planning Handbook (FSH 1909.12), however, clearly provides that certain specific findings required by NFMA, including determinations on the appropriateness of even-aged management and the optimality of clearcutting, must be made

and documented during Forest Plan implementation on a project-by-project basis.

Conclusion

The Regional Forester is affirmed. The Forest Plan does not make the site-specific finding required by NFMA that clearcutting is the optimum method for harvesting. While clearcutting is allowed it is not mandated by the Forest Plan. The final decision on which harvest method will be used on a particular site will be based on a site-specific silvicultural prescription and interdisciplinary review. As the Forest Plan is implemented, the Regional Forester must ensure that alternative cutting methods to meet site-specific conditions and objectives are considered before making a finding that clearcutting is the optimum cutting method.

D. Timber Harvest Level

Appellants argue that the Wayne National Forest ". . . because of its unique geographic feature of soil, slope and watershed conditions, is not capable of maintaining a long term sustained yield of timber" (SOR, page 46). The appellants contend . . . "the Wayne Forest is not suitable for such an extensive harvest level as described in the Forest Plan and as a result, the Plan violates relevant law and the implementing regulations" (SOR, page 47).

In addition, the appellants contend, "the public is generally opposed to the level of timber harvest scheduled under the plan. However, the Forest Service has largely ignored this type of public input" (SOR, page 45).

It is important to note that ASQ in the Forest Plan is the upper limit for timber outputs for the plan period, not actual proposals for timber sales offerings. The Forest Plan makes no promise or assurance that the outputs for any resource, including timber, will actually occur at the projected level. The annual timber sale offerings depend on factors such as budget, markets for wood products, and other conditions which may limit the practicability of offering sales at levels displayed in the Forest Plan. These factors cannot be foretold with certainty. In addition, Forest Plan revisions or amendments may set new management direction in the future. Forest Plans must be revised each 10 to 15 years (16 U.S.C. 1604) and with each revision all resources are reanalyzed pursuant to 36 CFR 219.12 in the light of new or changed conditions. In the case of the timber resource, sale levels lower or higher than the previous Forest Plan's levels could be adopted as a result of the changed conditions and new management direction.

The ASQ established by the Forest Plan is well below the estimated long-term sustained-yield capacity of the Forest. In the first decade, the annual average ASQ is 7.5 MMBF; it is projected to raise to 16.8 MMBF by the fifth decade. The long-term sustained-yield capability of the Forest under the management described in the Forest Plan is 18.4 MMBF per year in each decade (FEIS, page 1-10; ROD, page 19).

The Regional Forester has used the analysis phase of the planning process to identify public demands and various options to provide an appropriate mix of goods and services consistent with appropriate laws, regulations, and productivity of the natural resource base. The ROD (pages 10-23) discusses the management problems developed from the public issues and management concerns raised during the scoping

process. Timber harvest levels was one of the management problems addressed.

In considering which alternative best maximizes net public benefits, the Regional Forester examined public preferences, benefits and costs, as well as environmental effects, and social and economic implications of the alternatives with respect to multiple uses and other resource issues (ROD, pages 7-24). The logic and rationale leading to the Regional Forester's decision on the appropriate mix of resource uses and allocations are adequately stated.

While the appellants (and some others commenting on the Forest Plan) believe the timber harvest level should be reduced, the results of the various public involvement activities indicate there are other members of the public who disagree (see FEIS, pages 2-15 through 2-23). The Wayne National Forest supplies the local economic impact area with 40 percent of the annual log requirements (ROD, page 19). The mills in the area provide local job opportunities and community stability supporting traditional lifestyles (DEIS page 2-106). In addition the harvest program contributes to providing desired wildlife habitat as well as a broad range of dispersed recreation opportunities. With these considerations in mind, we do not believe that undue emphasis is placed on timber management; nor is the timber management program inconsistent with the Multiple Use Sustained Yield Act (MUSYA). Furthermore, the long time sustained yield (LTSY) was based on the acres suitable for timber production. As we discussed at page 7 of this decision (Issue 1 B) the interdisciplinary characteristics of lands in determining which lands were physically suited to timber production. Land not physically suited to timber production is therefore not considered in determining the LTSY. The planners'

consideration of the physical characteristics is well documented in appendix B (pages B3-37 to B3-39) of the DEIS.

Conclusion:

In adopting an alternative that maximizes net public benefit, the Regional Forester has met the requirements of the MUSYA, NEPA, NFMA, and the implementing regulation 36 CFR 219. The Regional Forester is affirmed.

Conclusion on Issue:

Our analysis of this issue concluded that the conditions of the Forest Plan for the Wayne National Forest are sufficiently different from the San Juan/GMUG National Forests and the MacCleery guidelines do not apply. The Regional Forester has explained (in the Record of Decision) his rationale for the proposed vegetation management program, efforts to reduce timber management costs and raise revenues, and the circumstances under which timber sale levels would increase or decrease.

The Regional Forester explains his reasons for believing that the Wayne Forest Plan will maximize net public benefit in the ROD, principally on pages 7 to 24. He states (page 4) that "in making the decision, a determination of net public benefits cannot be reduced to any kind of single index for comparison of the alternatives." He goes on to discuss how the Forest Plan responds to a variety of different management problems, the compatibility of the Forest Plan with the plans of other entities, the potential for controversy, cost efficiency, and the environmental consequences of the Forest Plan. The ROD evidences a well-reasoned decision and therefore, the Regional Forester is affirmed.

We conclude that the Forest Plan, DEIS, and FEIS satisfy the requirements of NFMA with respect to the planning level evaluation of harvest methods. Clearcutting may be selected as the appropriate harvest method for a project only when it is determined to be the optimum method. This determination will be made during project-level analysis consistent with the NEPA process.

ISSUE 2. WHETHER THE FOREST PLAN VIOLATES NEPA.

The appellants raise two EIS concerns regarding NEPA. First, they assert that the Forest Plan has failed to consider a reasonable range of road construction alternatives. Second, appellants assert that the NEPA regulations require the cumulative effects of the planned road construction on the Forest's environment be considered.

A. Appropriate Range Of Alternatives

Appellants contend that the Forest Plan EIS has failed to consider a reasonable range of road construction alternatives and, therefore, violates NEPA.

Appellants argue that given the importance of the issue of below-cost sales to the public, "[t]here simply must be alternative methods for timber harvest support rather than building more roads" (RRS, page 12).

The purpose of a Forest Plan is to provide for management of all multiple uses of a unit of the National Forest System (16 U.S.C. 1604(e)(1)). Pursuant to the NFMA regulations, "[t]he primary goal in formulating alternatives, besides complying with NEPA procedures, is to provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits, consistent with the resource integration and

management requirements of section 219.13 through 219.27" (36 CFR 219.12(f)). Alternatives prepared for consideration as a Forest Plan are to provide a range of reasonable management scenarios for the various resources in response to the identified public issues, management concerns, and resource opportunities. Further, NEPA regulation 40 CFR 1502.14(a) requires the Forest Service to ". . . explore and objectively evaluate all reasonable alternatives . . . ."

In developing a Forest Plan for a 10- to 15-year planning period, there are virtually an infinite number of alternatives that could be evaluated in detail. Consideration of all of these is obviously an impossible task. With this in mind, the planning regulations contemplate development of a reasonable range of alternatives. The range of alternatives developed for management of the Wayne National Forest was defined ". . . by the range of responses necessary to address the major public issues, management concerns, and resource opportunities identified during the Forest planning process . . ." (FEIS, Chapter II, page 6). Each alternative has a mix of goals and objectives in response to management problems and consists of ". . . the most economically efficient set of prescriptions needed to meet these goals and objectives" (FEIS, Chapter II, page 5).

As mentioned previously, alternatives are to provide for a wide range of management scenarios for the various uses of the National Forest. Therefore, alternatives cannot be completely specified by a single output such as miles of road construction. Output levels, such as miles of road construction, contribute to the development of management scenarios but are not, in themselves, alternatives. Estimates of output levels for the various resources, within the alternatives, are presented to assist the public to better understand possible consequences of

implementing a particular alternative. Output levels themselves are not subject to the NEPA requirements for a reasonable range of alternatives.

In developing a Forest Plan, it is reasonable to expect that alternatives designed to meet the established goals and objectives (which are developed to meet the intent of the regulations) on an already managed National Forest may produce similar results. The Forest Plan does demonstrate variation in management emphasis between alternatives. The fact that some of the alternatives have similar outcomes regarding projected resource outputs does not, by itself, establish a violation of the NEPA, Natural Resources Defense Council (NRDC) v. Hodel, 624 F. Supp. 1045, 1053 (D. Nev. 1985), aff'd, Natural Resources Defense Council (NRDC) v. Hodel, 819 F.2d 927 (9th Cir. 1987).

Conclusion:

Given that the range of alternatives that could be examined is infinite, those that are considered in the FEIS must be defined by resource potentials, public issues and concerns, tradeoffs, and environmental consequences. We conclude that the alternatives presented meet these requirements and were of sufficient detail to allow the Regional Forester to make a reasoned choice among alternatives. The Regional Forester is affirmed.

B. Cumulative Effects

Appellants cite the NEPA regulations and state that these require that the cumulative effects of the planned road construction on the Forest's environment be considered (SOR, page 41).

During the scoping process, Forest planners identified the magnitude, location and effects of road construction as major public concerns (DEIS, Appendix A). The cumulative effects of road construction and reconstruction are evaluated by alternative in terms of land uses, soils, visuals, water quality, wildlife habitat, and other environmental conditions in the DEIS (pages 4-49 through 4-71).

Cumulative impacts are covered in CEQ regulations on the scope of an EIS (40 CFR 1508.25). This section requires that an EIS address the direct, indirect, and cumulative impacts of proposed actions. "Cumulative impact" is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . ." (40 CFR 1508.7). As we have discussed earlier, the Forest Plan provides the framework for future management of the National Forests and does not usually make site-specific project decision. The EIS for a Forest Plan is, therefore, programmatic in nature. As described above, the scope of the action being considered in this instance does not involve an irretrievable commitment of resources. Thus, cumulative impacts of site-specific decisions need not be discussed at the Forest Plan level as long as they are discussed before a decision is made which results in an irretrievable, irreversible commitment of the resource. In this case, cumulative effects must be addressed before the final commitment is made at the project level.

Conclusion on Issue:

The Regional Forester is affirmed. The range of alternatives presented in the FEIS represents reasonable management scenarios for the various resources of the Forest and complies with NEPA's requirement for a reasonable range of alternatives. We conclude that the cumulative effects presented

in the EIS for road construction are sufficient, given the nature and scope of the decision to approve the Forest Plan. We emphasize, however, that cumulative effects analysis must be completed for site-specific projects or activities prior to any irretrievable and irreversible decision. The Regional Forester's decision is affirmed.

ISSUE 3. Whether the Forest Plan is based on an adequate assessment of wildlife diversity.

Appellants contend that the Forest Plan will destroy wildlife diversity by promoting early successional habitat, which is already overabundant in Southeast Ohio, to the detriment of mature Forest which is in short supply. "[C]onsequently, this will result in even less wildlife diversity. This wildlife strategy is premised on a misreading of the diversity provision of the NFMA . . ." (SOR, page 52). To support this contention, the appellants make the following points in their SOR:

A. The wildlife strategy focuses almost exclusively on the use of timber harvesting to increase early successional Forest habitat (SOR page 52).

B. The Plan fails to consider the consequences of roads, fragmentation and edge effects on wildlife species requiring mature Forest (SOR page 58).

C. The Plan misuses the concept of management indicator species which results in a bias toward early successional species (SOR page 65).

In support of the above contentions, the appellants present their view of the NFMA provisions, the accompanying regulations, and Congress's intent as they view them pertaining to diversity. The appellants maintain that these provisions require that the Forest Plans provide for the diversity of plant and

animal through maintenance of the Wayne National Forest's natural environment. The appellants criticize the Forest Plan in general for not meeting the intent of these provisions as they interpret them.

The diversity provision of the NFMA must be read in context with the other requirements of the law. Before we discuss appellants' specific contentions, it is important to describe the Agency's concept of diversity under the provisions of the NFMA and its regulations.

BACKGROUND ON THE DIVERSITY IN FOREST PLANNING

The National Forest Management Act of 1976 provides statutory direction for managing the National Forest System to provide for diversity of plant and animal communities. Section 6(g)(3)(B) of the NFMA, the diversity provision, states:

> The [planning] regulations shall include, but not be limited to . . . (3) specifying guidelines for land management plans developed to achieve the goals of the [RPA] Program which . . . (B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan.

The legislative history of the NFMA indicates that the two basic parts of the diversity provision resulted from concerns about large scale Forest type conversions and the associated effects on plants and wildlife communities. (See specifically: (1) April 27, 1976, Senate Committee on Agriculture and

Forestry and Senate Committee on Interior and Insular Affairs, Transcript of Proceedings, S. 3091, As Amended, pp. 51-54, (2) H.R. Report No. 1478, part 1, 94th Congress, Second Session, p. 31, and (3) Senate Report No. 1335, 94th Congress, Second Session, pp. 26-27).

The diversity provision of the NFMA must be read in context with the other requirements of the law. Section 6 of the NFMA requires that each Forest Plan provide, in a single set of documents, the overall management direction and guidelines for management of the applicable National Forest for a period of 10-15 years (16 U.S.C. 1604(f)). The NFMA requires that the Forest Service apply a systematic, interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences in the preparation and implementation of Forest Plans (16 U.S.C. 1604(b)). The Forest Plan is to ensure coordination of all multiple uses: outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness (16 U.S.C. 1604(e)). These and the other provisions of the NFMA must all be read together to promulgate and maintain a land and resource management plan. Diversity is one of a multitude of factors that must be considered in developing Forest Plans that "provide for multiple use and sustained yield of the products and services obtained (from the applicable National Forest) in accordance with the Multiple-Use Sustained-Yield Act of 1960" (16 U.S.C. 1604(e)(1)).

To ensure an adequate consideration of diversity consistent with section 6(g)(3)(B), the implementing regulations (36 CFR 219) address diversity at several points. First, the regulations provide a definition of diversity to guide land and resource management planning:

> 36 CFR 219.3 Definitions and terminology. For purposes of this subpart the following terms, respectively, shall mean: . . . Diversity: The distribution and abundance of different plant and animal communities and species within the area covered by a land and resource management plan.

Other sections of the regulations where the term "diversity" is used are:

> 36 CFR 219.26 Diversity. Forest planning shall provide for diversity of plant and animal communities and tree species consistent with the overall multiple-use objectives of the planning area. Such diversity shall be considered throughout the planning process. Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition. For each planning alternative, the interdisciplinary team shall consider how diversity will be affected by various mixes of resource outputs and uses, including proposed management practices.
>
> 36 CFR 219.27 Management Requirements. (a) Resource Protection: All management prescriptions shall-- (5) Provide for and maintain diversity of plant and animal communities to meet overall multiple use objectives, as provided in paragraph (g) of this section:
>
> (g) Diversity: Management prescriptions, where appropriate and to the extent practicable, shall preserve and enhance the diversity of plant and animal communities, including endemic and desirable naturalized plant and animal species, so that it is at least as great as that which would be expected in a natural Forest and the diversity of tree species similar to that existing in the planning area. Reductions in diversity of plant and animal communities and tree species from

> that which would be expected in a natural Forest, or from that similar to the existing diversity in the planning area, may be prescribed only where needed to meet overall multiple use objectives. Planned type conversion shall be justified by an analysis showing biological, economic, social, and environmental design consequences, and the relations of such conversions to the process of natural change.

Regulation 36 CFR 219.26 establishes minimum requirements for integration of diversity throughout the Forest planning process, and 36 CFR 219.27 establishes requirements for resource protection and enhancement of diversity.

These requirements direct that, for the planning area (the area of the National Forest System covered by a Forest Plan): (1) information is to be collected, (2) diversity is to be considered and evaluated, (3) management prescriptions are to provide for diversity (where appropriate and to the extent practicable), and (4) reductions in diversity--including type conversions--are to be justified in terms of overall multiple-use objectives.

The Forest Plan establishes the requirements, vision, and expectations for the diversity of plant and animal communities that best meet overall multiple-use goals and objectives for the planning area. The Forest Plan guides project implementation through Forest-wide standards and management area prescriptions. Activities and projects must be consistent with the Forest Plan.

Monitoring and evaluation of the collective effects of all projects and activities, including the addition of new information, will determine if Forest-wide requirements are being met and whether adjustments in the Forest Plan are required to meet overall multiple-use objectives.

EVALUATING DIVERSITY

The regulations call for diversity to be considered throughout the planning process (36 CFR 219.26). The diversity provided by a Forest Plan is evaluated by determining how that Forest Plan has considered the distribution and abundance of plant and animal species and communities to meet its overall multiple-use objectives. Several of these objectives are clarified by 36 CFR 219.

Specifically, Forest planning shall provide that:

A. Management direction contributes to recovery and conservation of federally listed threatened or endangered species (Endangered Specifies Act, 36 CFR 219.19).

B. Management of habitat provides for the maintenance of viable populations of existing native and desired nonnative wildlife, fish (36 CFR 219.19), and plant species (USDA Regulation 9500-4) well distributed throughout their current geographic range within the National Forest System. As interpreted by the Secretary, this means that LRMP's should identify or be amended to identify known sensitive species and provide Forest Standards and Guidelines that ensure conservation when an activity or project is proposed that would affect the habitat of a sensitive species (USDA Decision on Review of Administrative Appeals of the Beaverhead NF LRMP by John L. Evans, August 17, 1989).

C. Management of plant and animal communities identified in Regional Guides or Forest Plans as issues that warrant special measures achieve overall multiple-use objectives (36 CFR 219.8, 219.12(b), 219.27).

D. Management direction includes objectives for selected management indicator species (36 CFR 219.19). The Forest Plan should specify for plant and animal species and/or communities identified as major Forest Plan issues or management indicators:

1. Standard and guidelines for protection, viability, recovery, or restoration as appropriate to meet overall multiple-use objectives (36 CFR 219.27);

2. The expected future conditions in terms of distribution and abundance of populations or habitats to meet overall multiple-use objectives (36 CFR 219.11, 219.26);

3. The schedule for monitoring and evaluation of standards, guidelines, and objectives for plant and animal species and communities (36 CFR 219.27); and

4. A discussion of any proposed type conversions. If any conversion results in a reduction in diversity, explanation must be provided to explain why the conversion is necessary to achieve multiple use objectives (36 CFR 219.27).

We now turn to the specific concerns expressed by the appellants about diversity.

A. The Use Of Timber Harvesting To Increase Habitat

Within the argument that the Forest Plan fails to insure species diversity, appellants contend that the Forest Plan's focus is on the use of timber harvesting to create wildlife habitat which increases early successional habitat while decreasing old growth habitat. The appellants maintain that the timber

program will benefit many of the animal species already found in private lands surrounding the Forest while adversely affecting . . . "Forest interior species, especially the key, regionally scarce wildlife species" (SOR, page 59). The resulting "highly altered and fragmented landscape" will . . . "bear little resemblance to the Forest's natural diversity of communities" (SOR, page 58).

As discussed in the previous section, the NFMA, Section 6(g)(3)(B) requires Forest Plans to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives" and, where appropriate and to the extent practicable, "to preserve the diversity of tree species similar to that existing in the region controlled by the plan." The legislative history of the NFMA indicates that this provision resulted from concerns about large scale Forest type conversions and the associated effects on plants and wildlife communities. We do not find support in the Act or its legislative history for the assertion that Forest Plans were expected to achieve diversity by maintaining an undisturbed environment; nor do we find that using even-aged timber management to achieve a distribution of timber age-classes and wildlife openings is in any way inconsistent with the requirements in the Act.

It is important to note that, although the natural Forest is used in the regulations as one point of reference for evaluating diversity, the regulations do not imply that diversity can only be achieved by preservation of the existing environment. Rather, the diversity provided by a Forest Plan is evaluated by determining how that plan has considered the distribution and abundance of plant and animal species and communities in meeting its overall multiple-use objectives. Diversity

establishes no additional requirements beyond those identified for management indicator species, for population viability of sensitive species, for the recovery of threatened or endangered species of plants and animals, and for protection of special habitat. The Forest has addressed these points throughout the Forest Plan (pages 4-38 through 4-50, appendix B), EIS (chapter 3 and 4), and as such, has met the requirements of the regulations consistent with the multiple-use objectives of the planning area as expressed in each alternative (36 CFR 219.26).

The Wayne Forest Plan includes Forest-wide standards and guidelines for threatened and endangered species, sensitive species, and special habitats (Plan, pages 4-28 through 4-50). Issues related to vegetative management and wildlife habitat diversity were identified early in the planning process as management problems. The Regional Forester points out that as a result of public comments received on the DEIS changes were made in the Forest Plan to give more emphasis to large, continuous forest tracts and associated wildlife species (ROD, page 6). The cerulean warbler was added as a Management Indicator Species (MIS) for older hardwood forest. The Forest Plan designates management indicator species, establishes population objectives for them, and includes provisions to monitor population and habitat changes (Forest Plan, Appendix B and pages 5-8 and 5-9).

B. Consequences of Road, Fragmentation, and Edge Effects

Appellants contend that populations preferring large blocks of natural Forest habitat are being ignored in favor of species favoring early successional habitat. Road construction and timber harvesting . . . "will fragment areas of older Forest and isolate species dependent on that habitat" (SOR, page 53).

"[T]he increased fragmentation resulting from the Plan . . . favors edge and transient species at the expense of species requiring stable, mature Forest habitat" (SOR, page 63).

Appellants have provided a general discussion of the negative effects of clearcutting and road construction such as fragmentation and edge effect. The appellants express their concern for "the many bird species" which they believe will be affected by roads and related management activities.

The Regional Forester responds that the Forest has recognized Forest fragmentation and road density concerns from the onset of the planning process. As a result of comments received on the Draft Forest Plan, "changes have been made in the Final Plan to give greater emphasis to old-growth Forest and provide more large, unbroken areas of mature and overmature hardwoods" (FEIS, page 2-27).

The Forest planning regulations provide that the interdisciplinary team shall consider how the abundance and distribution of different plant and animal communities and species will be affected by various mixes of resource outputs and uses (36 CFR 219.3 and 219.26). The Wayne National Forest Plan provides direction for managing old growth habitats in Management Areas 6.2 and 6.3 (Plan, pages 4-124 through 4-129). Issues related to wildlife management and large areas of old-growth forest were identified in the planning process and are addressed in the FEIS (chapter 2). The Forest Plan designates management indicator species and includes provisions to monitor population and habitat changes (Plan, Appendix B and pages 5-8 and 5-9). The Regional Forester recognized the need to provide a "wide variety" of habitats, including old-growth forests to support all wildlife and fish species (ROD pages 15 and 16).

C. Management Indicator Species

Appellants contend the "indicator species as selected heavily favor species requiring early successional habitat such as openings or Forest edge rather than interior Forest species requiring late successional habitat" (SOR, page 54).

It should be emphasized that management indicator species serve a special function for evaluating the efforts of the Forest Plan's management direction on plant and animal populations and habitat (36 CFR 219.19). They should not be interpreted as the only species of concern when management activities are undertaken. The effects of management activities on fish and wildlife habitat are evaluated through the selected management indicator species. Our review indicates that the Forest Plan identified a variety of management indicator species which were selected to meet the criteria identified in the Forest planning regulations. In cooperation with the Fish and Wildlife Service, the Ohio Department of Natural Resources, and nine different universities, Wayne National Forest planners identified the principle habitat components of all plants and animals (mammals, birds, reptiles, amphibians, and others) that occur in the Forest. Through this process representative species were then selected as Forest indicator species for all habitat types (see Plan, Appendix B). Forest Planners explained their reasons for selecting certain management indicator species in the DEIS (pages, 3019 to 3-21) and Appendix B. The Final Plan gives more emphasis to old-growth forests and associated forest wildlife (ROD page, 16). As a result of the added emphasis on old-growth forests, the Cerulean Warbler was added as an indicator species of this habitat type (FEIS pages 2-38 through 2-39).

There is no evidence that implementation of the Plan would result in a failure to comply with 36 CFR 219.27 for any

species. The Regional Forester applied a process/interpretation that was valid and consistent with the Forest Service planning process.

Conclusion on Issue:

The Wayne Forest Plan provides for diversity in accordance with the requirements of NFMA and the planning regulations. The Regional Forester is affirmed.

The Plan strives to balance habitat requirements for a wide variety of wildlife species. The MIS selected for monitoring in the Forest Plan reflect all the biotic communities in the Forest that will or could be affected by proposed management in the Forest Plan.

Openings created as a result of even-aged timber management obviously change the Forest environment and favor some plant and animal species over others at affected sites. It is not evident, however, that the amount, timing, location, and standards for even-aged timber harvests under the Forest Plan will have adverse effects on the abundance and distribution of plant and animal species Forest-wide. As individual projects are proposed, among the effects to consider in deciding whether or not to go ahead with a project will be the effects on wildlife and plants.

With respect to the requirements for monitoring activities, the Plan identifies "population trends" of MIS as well as acres of suitable habitat for monitoring. In addition, the Forest Plan indicates that evaluation of monitoring results will occur on an annual and 5-year basis. The monitoring portion of the Plan meets the direction of 36 CFR 219.12 and 36 CFR 219.19(6).

ISSUE 4. WHETHER THE FOREST PLAN PROTECTS WATER QUALITY.

The appellants are concerned about the effects of clearcutting, road construction, and mining activity on water quality. The appellants contends that, to comply with NFMA, NEPA, and Federal and State clean water laws, the Forest Plan . . . "must have adequate data and undertake a thorough analysis of the impact of Forest management on specific water resources" (SOR, page 69).

Since the Forest Plan does not make decisions on specific projects, it is not possible or appropriate for the EIS to analyze site-specific impacts of timber harvesting, road construction, or other projects on individual streams.

Site-specific data on existing stream conditions are available and are used for project-level planning (RS, pages 41-43). Interdisciplinary teams analyze the site-specific environmental effects, including cumulative effects, of each proposed management activity in accordance with NEPA procedures before a decision is made to proceed with a project. The Regional Forester emphasizes that mitigation measures will be monitored to confirm their effectiveness or to show the need for changes in management practices of the Forest Plan (ROD, page 39)

Forest-wide standards and guidelines require the maintenance of water quality and instream uses and compliance with State water quality management plans and applicable provisions of the Clean Water Act of 1977 (Plan, pages 4-28 through 4-38). Forest Plan Appendix F (Soil Limitations To Vegetative Management Activities) discusses mitigation measures or limitations on activities that may be needed to protect water and soil resources under various soil, slope, and vegetation

conditions. Standards and guidelines are applied during the development and implementation of all projects that may affect water quality to protect individual streams.

Many of the concerns raised by the appellants on the cumulative effects of management activities are addressed in both chapter 2 and 4 of the EIS. For the most part, the environmental effects of management activities on water quality were not considered significant because of the mitigation measures required by Forest Plan standards and guidelines. Monitoring will determine whether the standards and guidelines and mitigation measures established in the Forest Plan are followed and are effective in protecting water resources.

Conclusion on Issue:

The standards and guidelines in the Wayne Forest Plan provide adequate direction for compliance with applicable laws and regulations on water quality and for the protection of water resources on the Forest. The Regional Forester is affirmed.

ISSUE 5. WHETHER THE FOREST PLAN VIOLATES NFMA AND 36 CFR 219 WITH RESPECT TO RECREATION AND WILDLIFE

The appellants maintain that planners for the Wayne Forest Plan gave preference in the planning process to timber production, and that the level of harvest in the Forest Plan will be detrimental to the recreation and wildlife resources.

The appellants construe the fact that 75 percent of the Forest has been identified as suitable for timber harvest while 10 percent is managed for semiprimitive recreation as evidence that timber production received priority consideration and recreation was inadequately considered in the Forest Plan.

Contrary to appellants' contention that the Forest Plan is legally required to provide a full range of recreation opportunities, there is no requirement in NFMA or its regulations that a Forest Plan must provide any specified level or type of outdoor recreation. The NFMA regulations at 36 CFR 219.21 require that: "[t]o the degree consistent with needs and demands of all major resources, a broad spectrum of Forest and rangeland related outdoor recreation opportunities shall be provided for in each alternative." Subsection (a), (b), (c), and (d) state the following procedural requirements:

(a) Forest planning shall identify -
  (1) The physical and biological characteristics that make land suitable for recreation opportunities;
  (2) The recreation preferences of user groups and the settings needed to provide quality recreation opportunities; and
  (3) Recreation opportunities on the National Forest System lands.

(b) The supply of developed recreational facilities in the area of National Forest influence shall be appraised for adequacy to meet present and future demands.

(c) Planning alternatives shall include consideration of establishment of physical facilities, regulation of use, and recreation opportunities responsive to current and anticipated user demands.

(d) In formulation and analysis of alternatives . . . interactions among recreation opportunities and other multiple uses shall be examined. The examination shall consider the impacts of the proposed recreation activities on other uses and values and the impacts of other uses and activities associated with them on recreation opportunities, activities, and quality of experience.

These requirements are procedural in nature. Information is to be collected, the recreation resource is to be evaluated, and each alternative is to consider a broad spectrum of outdoor recreation opportunities consistent with the needs and demands for all major resources.

Although none of the alternatives provide as much semi-primitive recreation opportunities as the demand estimates, all alternatives respond to the demand by increasing opportunities over current levels. Such consideration for anticipated demand meets the basic requirement of 36 CFR 219.21(c): "alternatives shall include consideration of . . . recreation opportunities responsive to current and anticipated user demands."

The appellants further state that the Forest Plan "commits the Wayne National Forest to massive timber production while ignoring the recreational needs of the people" (SOR, page 74) and that timber harvesting and road building will negatively affect the economic benefits of recreation (SOR, page 78). The appellants throughout their appeal have maintained that timber harvesting and road building are incompatible with the attributes of the Forest that attract other users, such as dispersed recreation opportunities, wildlife habitat, scenic beauty, and water quality. Specifically, they contend that the Forest Plan subordinates non-motorized recreation opportunities, visual quality, and wildlife to timber production.

The NFMA regulations require that ". . . plan shall provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public benefits in an environmentally sound manner" (36 CFR 219.1(a)). There is no absolute measure of "long term net public benefits." The NFMA, 16 U.S.C. Section 1604(g)(3)(A), directs that the development of Forest Plans

include ". . . consideration of the economic and environmental aspects of various systems of renewable resource management . . . to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish."

Economic benefits and costs for some Forest uses, such as timber management, wildlife, and recreation, are measured by the present net value (PNV) concept (DEIS, pages 2-77 to 2-87). The tables in the DEIS (Page 2-91 to 2-94) compare timber harvest and recreation benefits provided by the Forest Plan with current management. Recreation opportunities under the Forest Plan shift to more non-motorized recreation uses, but the increased value related to the economic benefits of these uses does not compensate for the loss of benefits derived from the reduction in timber harvesting and developed recreation. (The same comparison can be made between wildlife improvements and timber harvesting.) Consequently, the PNV of the selected alterative is lowered. Looking only at PNV considerations, the Regional Forester would have cause to conclude that increasing rather than lowering timber harvest levels would add to the economic benefits from the Forest overall.

Of course, PNV calculations do not take into account all of the benefits provided by the Forest. The Regional Forester selected an alternative with a lower level of timber harvest and PNV than some other alternatives, with the acknowledgement that tradeoffs in PNV (or opportunity costs) are accepted in order to achieve other important non-priced benefits (ROD, page 27; DEIS, page 2-77).

Even though the appellants would prefer to see commodity production reduced lower than the levels in the Forest Plan, it is not apparent that this shift in multiple-use allocation on the forest would increase long-term net public benefits. Public

satisfaction with the balance between commodity and non-commodity Forest uses, as well as the environmental impacts of these uses, will be a matter of continuing review on the Wayne National Forest as part of the implementation, monitoring, and evaluation of the Forest Plan.

Conclusion on Issue

We conclude that the Forest Plan, DEIS and FEIS meet the provisions of 36 CFR 219 with respect to the issues raised by the appellants, and the Regional Forester is affirmed.

ISSUE 6. WHETHER THE FOREST PLAN'S ASSESSMENT OF THE VISUAL RESOURCE VIOLATES NFMA AND REGULATIONS

The appellants contend that the Forest Service has violated the NFMA and accompanying regulations by not properly considering the aesthetic and visual values in the planning process. To support this contention, appellants argue that:

A. The Forest Service failed to evaluate the public's visual expectations for the Wayne National Forest in violation of NEPA, NFMA and the regulations (SOR, page 81).

B. The Plan's visual quality objective "Maximum Modification" is a violation of the NFMA (SOR, page 84).

A. Compliance with the regulations pertaining to visual resources and evaluation of the public's visual resource expectations.

The appellants allege that the Forest Plan violates NFMA by failing to give the visual resource due consideration as a multiple use and Forest value equal with timber production and other Forest resources. As a result, appellants maintain that

Forest planners . . . "failed to consider both the landscape's visual attractiveness and the public's visual expectation" (SOR, page 83).

Public expectations for the visual resource on the Forest were considered in the formulation and evaluation of alternatives for the Forest Plan through the use of visual quality objectives. (Agriculture Handbook #462, Volume 2, Chapter 1 contains direction on the visual resource management system, including visual quality objectives.) Visual quality objectives reflect the degree of acceptable alternation of a characteristic landscape resulting from management activities (DEIS, page E-29). They take into consideration visual variety in the landscape, viewer sensitivity or interest in the scenic qualities of the landscape, and the relative distance of a landscape from an observer. The Regional Forester's responsive statement (pages 52-55) summarizes the process used to incorporate visual quality objectives into the evaluation of alternatives. The EIS displays for each alternative an estimate of the number of acres that would be in each visual quality objective category as a result of the proposed management activities (DEIS, pages 2-71 and 4-16 through 4-17). The EIS also discusses the consequences of road construction and even-aged/uneven-aged management on the visual resource in chapter 4.

The Regional Forester acknowledges in the ROD (Page 11) that "a large number of commenters on the DEIS and Proposed Plan" wanted to have more of the natural, undisturbed appearance of the Forest protected. In response to public concerns, Management Area 6.2 was increased from 11,200 acres in the Proposed Plan to 17,200 acres in the Final Plan in order to enhance semiprimitive nonmotorized recreation opportunities in these areas. In addition, Management Area 6.1 will provide 10,400 acres for semiprimitive, nonmotorized

recreation opportunities. While there will be evidence of human activities such as timber harvesting, these management practices must be in harmony with the natural-appearing forest landscape.

B. The Plan's treatment of the visual resource using a visual quality objective (VQO) of "Modification".

The appellants contend that, "The visual resource as provided for and treated under the plan and VQO of modification would clearly suffer effects which are irretrievable and/or irreversible" (SOR, page 88). The type of visual diversity and quality found in a mature natural Forest setting should be the benchmark against which proposed management activities are measured. The management practice of clearcutting "is in direct conflict with public expectation for visual quality found in natural appearing Forest" (SOR, page 89).

The Regional Forester responds that the Wayne National Forest Final Forest Plan incorporates VQO in accordance with the NFMA and the Forest Service Visual Management System. He goes on to say that in comparing change from the present, the Forest Plan "provides 24 percent more area in retention than present, 6 percent less in Partial Retention and 17 percent less in Modification and Maximum Modification. The net result is greater emphasis is given to enhancing visual management Forest wide, than previously" (RS, page 53).

In reviewing the record, we find that visual management has been addressed in the LRMP and FEIS. For instance, the Forest Plan had goals and objectives for visual quality, forest-wide standards, objectives for each management area, and a requirement to monitor visual quality objectives as they relate to vegetative management. The standards and guides developed in the Forest Plan are a result of the identification

of many of the concerns expressed by the appellants early in the planning process. The capability of the Wayne National Forest to fulfill public recreational expectations based on the existence of high density roads and scattered land ownership patterns was identified early in the issues, concerns, opportunities identification process (FEIS, Appendix A).

The appellants contend that the visual degradation permitted in the VQO category modification is essentially a violation of NFMA (SOR, page 84). The modification category is defined in the DEIS (page E-14) as follows: "management activities may dominate the characteristic landscape but must, at the same time, utilize naturally established form, line, color, and texture. It should appear as a natural occurrence when viewed in foreground or middleground." This definition complies with NFMA regulatory requirements for visual management (36 CFR 219.21(f)).

Although the Regional Forester has determined that even-aged management (in particular clearcutting or shelterwood harvest methods and a visual quality objective of modification) is preferred in selected management areas, the final determination of the appropriateness of these is yet to be made on a site by site basis. This determination will be accomplished through site specific analysis in compliance with NEPA and other relevant laws, regulations, and policies.

Conclusion on Issue

The Regional Forester is affirmed. The Forest Plan and FEIS have met the requirements of 36 CFR 219.21(f) with regard to the analysis and consideration of the visual resource. The final determination of the VQO for a site-specific area will be made and documented during project analysis.

The VQO assigned for a particular project will at least meet, and may exceed, the VQO assigned to the Management Area as a whole. You may participate in site-specific, project level decisions on these matters. You have opportunities to be notified, to obtain information, and to make your views known. Your participation is encouraged.

ISSUE 7. WHETHER THE FOREST PLAN RESPECTS THE CULTURAL RESOURCE REPRESENTED BY THE WAYNE NATIONAL FOREST.

The appellants contend that . . . "the Forest Service, like so many outside exploiters, has failed to consider what it is they are actually doing to the people who are part of the Appalachian culture" (SOR, page 92). "The Wayne is the major cultural resource of Appalachian Ohio. As a fundamental cultural resource, the Wayne must be preserved on a historic basis. The Forest culture that has existed for nearly two centuries cannot be lost forever to the methodology of timbering in the Plan" (SOR, page 94).

There is no requirement in Law or regulation that the Forest maintain the pre-settlement Forest or ecosystems originating on the land to preserve a particular historic, economic, social environment as a cultural entity or way of life as described by the appellants.

The character and nature of the economic and social environment were important considerations in the development of the Forest Plan. The DEIS (Chapter 3) provides a detailed description of the existing environment, the physical and biological characteristics, and the economic and social setting on the Wayne National Forest. It also includes a discussion of how the Forest management actions impact surrounding local

and State economies and lifestyles of the people. Chapter 4 of the DEIS (pages, 4-68 through 4-69) assessed the economic and social impacts for all the alternatives.

We find that the planning documents (i.e., DEIS, FEIS, Forest Plan, and ROD) provide ample evidence to conclude that the economy and lifestyles of the people surrounding the Forest were key considerations throughout the planning analysis and in selecting the Forest Plan alternative.

A second general concern that appellants have expressed is that the Forest Plan did not receive sufficient "local" public involvement and that . . . "the Forest Service went to every effort to evade this responsibility" (SOR, page 93).

The Forest Service agrees that public involvement is a key element of NFMA and takes its public involvement responsibilities very seriously. The statue itself includes requirements for public review of draft Forest Plans. The Secretary has published regulations establishing the public involvement requirements applicable to development of Forest Plans (36 CFR 219.6 and 219.10(b)). As explained below, the Forest complied with these requirements during preparation of the Forest Plan. Appellants' characterization of the public involvement responsibilities is not consistent with the Secretary's interpretation.

The Wayne Forest Plan was developed with substantial public involvement, including providing opportunity for discussion of concerns and issues relating to management of the Forest by publics living within and near the Forest. The public involvement steps taken during development of the Forest Plan are identified in the Draft EIS in Appendix A. Those steps include publication of notices in the Federal Register and local newspapers. The draft Forest Plan was circulated to all those

who requested to be on the mailing list. The Final EIS contains a response to all of the comments received on the draft plan and EIS in chapter 2. By regulation, the Forest planning records created during the development of the Forest Plan are public documents and are to be made available to the public (36 CFR 219.10(h) and 219.6(j)). There can be no doubt that the Forest Service provided adequate opportunity for public involvement in the development of the Forest Plan, including identification of local issues concerns and opportunities to be addressed in the planning process.

Conclusion on Issue:

The Regional Forester is affirmed. The planning documents provide sufficient information to conclude that the character and nature of the local economy were factors in the decision to approve the Forest Plan and that positive effects to the local economy are projected from implementation of the Forest Plan.

APPENDIX F

No. 94-3407

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE SIERRA CLUB, ET AL.,	) [Filed
	) Apr 07 1997
Plaintiffs-Appellants,	) Leonard Green,
	) Clerk]
v.	)
	) **ORDER**
JACK WARD THOMAS, ET AL.,	)
	)
Defendants-Appellees,	)
	)
OHIO FORESTRY ASSOCIATION, INC.,	)
	)
Intervening Defendant-Appellee.	)
	)

BEFORE: MARTIN, Chief Judge; BATCHELDER, Circuit Judge; and COOK,* District Judge.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a

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* Hon. Julian A. Cook, Jr., Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

vote on the suggestion for rehearing en banc, the petitions for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Sierra Club and Citizens Council on Conservation and Environmental Control, Plaintiffs,	:	[Filed March 18, 1992]
vs.	:	Case No. C2-92-249
F. Dale Robertson, in his capacity as Chief of the United States Forest Service, Edward Madigan, in his capacity as the Secretary of Agriculture, Floyd J. Marita, in his capacity as Regional Forester, Eastern Region, and Francis J. Voytas, in his capacity as Forest Supervisor, Defendants.	:	Judge Graham Magistrate Judge Abel COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

JURISDICTION

1. The court has jurisdiction pursuant to 28 U.S.C. sections 1331 and 2201, this being an action to preserve and protect the resources and wildlife of the Wayne National Forest under the Forest and Rangeland Renewable Resources

Planning Act of 1974, as amended by the National Forest Management Act of 1976, Title 16 U.S.C. section 1600 et seq.; the Multiple-Use Sustained-Yield Act of 1960, Title 16 U.S.C. section 528 et seq.; the National Environmental Policy Act, particularly Title 42 U.S.C. section 4332 and the Administrative Procedure Act, Title 5 U.S.C. sections 553 and 701 et seq.

PARTIES

2. The plaintiff, the Sierra Club, is a non-profit public interest organization concerned with preserving the Wayne National Forest (hereinafter, "Forest" or "Wayne") while enhancing its recreational, wildlife and other values through proper planning and management. The plaintiff Sierra Club is organized under the laws of California and has its principal place of business in California. The Sierra Club has 619,419 members nationally and its Ohio chapter had 17,647 members as of June, 1991.

3. The plaintiff, Citizens Council on Conservation and Environmental Control, is a non-profit unincorporated association concerned with preserving the Wayne while enhancing its recreational, wildlife and other values through proper planning and management. The Council's membership resides in Athens County and Hocking County, Ohio.

4. Members of the plaintiffs, especially in Ohio, regularly visit the Wayne for recreational purposes including hiking, bird watching and camping. Members also visit the Forest for their avocational, occupational and professional interests including scientific and scholarly pursuits. Members visit portions of the Forest which under the current management plan for the Forest have been or will be subject to clearcutting

or other forms of logging of trees as a result of the defendants' unlawful practices regarding below cost timber sales.

5. The plaintiffs and their members have an interest in the enforcement and administration of the above-named Acts that extends beyond the generalized interest that all members of the public have in enforcement of the law. Final administrative actions of the Forest Service, taken in contravention of existing law, work a direct injury upon the plaintiffs and their members by allowing damaging illegal and inefficient use of natural resources in national forest areas. Such actions by the defendants result in direct and substantial injury to the plaintiffs and their members by reducing their enjoyment of, and ability to use, the Wayne.

6. Defendants F. Dale Robertson, Floyd J. Marita, Edward Madigan and Francis Voytas are sued in their official capacities. Defendant Marita is the Regional Forester for the Eastern Division of the Forest Service which includes the Forest. Defendant Marita issued the Record Decision approving the plan at issue in this case. Defendants Robertson and Madigan are the Chief of the United States Forest Service and the Secretary of Agriculture, respectively, who have responsibility for formulating and implementing Land and Resource Management Plans for the nation's national forests as well as ensuring that these plans and Forest Service actions comply with the law. Defendant Francis Voytas is the Forest Supervisor of the Wayne and has primary responsibility for implementing the plan, including the below-cost timber sales and clearcutting of old growth forest areas.

THE ADMINISTRATIVE APPEAL

7. On January 4, 1988, Defendant Marita issued a record decision adopting a ten year plan for the Forest as required by

Title 16 U.S.C. Section 1600 et seq. The decision followed a planning process beginning in 1986 in which the plaintiff, through its Ohio Chapter, and other similarly interested parties submitted comments and proposals to the Forest Supervisor regarding the plan favored and eventually adopted by the defendants.

8. While minor adjustments in the plan were made in response to the comments of the plaintiff and others, the most serious objections raised during the planning process were disregarded and not adequately addressed in the final plan as adopted by defendant Marita in his decision of January 4, 1988.

9. The plan adopted by defendant Marita, as subsequently approved, controls all management and policy decisions for the Forest until a subsequent plan is approved as a matter of law. As a matter of practice the current plan will significantly and materially impact on future planning processes as a reference point for any future plans. The implementation of the plan will, of necessity, affect future options.

10. On February 16, 1988, the plaintiff Sierra Club appealed defendant Marita's decision to defendant Robertson pursuant to the applicable regulations. On November 14, 1990, the appeal was denied and the plan affirmed. Defendant Robertson's decision became a final administrative decision of the Department of Agriculture when defendant Madigan elected not to review the matter within ten days of its receipt.

11. On February 18, 1988, plaintiff, the Citizen's Council, appealed defendant Marita's decision to defendant Robertson pursuant to the applicable regulations. On April 15, 1988, the Council submitted its statement of reasons in support of its appeal. Defendant Marita did not file the required

responsive statement to the plaintiff Council's submission until May 4, 1989, over a year later. On May 27, 1989, the plaintiff Council filed its reply to defendant Marita's responsive statement, completing the administrative record for the appeal. Thereafter, the defendant Robertson failed and refused to issue a final decision on the appeal.

12. On September 25, 1991, the plaintiff Council wrote the defendant demanding a decision. On November 12, 1991, defendant Robertson, through his agent, responded that a decision could be expected within 45 days. As of the date of filing of this action, no decision was rendered, even though almost three years have elapsed since the appeal record was completed. Upon information and belief, the defendants have implemented portions of the plan during the pendency of the Council's appeal. The actions of the defendants in continuing to fail and refuse to render a decision constitutes a denial of the Council's appeal.

FACTS

13. The Wayne National Forest unit includes within its boundaries 832,603 acres, but only 202,967 acres of the area is National Forest belonging to the federal government as the Forest unit boundaries contain land belonging to both the private and public sector of Ohio.

14. Located in the hill country of southeastern Ohio, the Wayne's lands are characterized by narrow ridge tops, steep slopes and narrow valleys. These characteristics make much of the Wayne physically and economically unsuitable for timbering, particularly clearcutting which involves cutting all saleable and unsaleable trees in large tracts within designated management areas of the Forest. These characteristics adversely affect the cost and difficulty of building the roads

necessary for the cutting and removal of the trees as well as the degree of damage caused by erosion and water run-off associated with clearcutting and road construction in forests.

15. Public lands available for recreation comprise less than 4% of the State of Ohio. Although it is one of the smaller national forests in the country, the Wayne comprises 24% of the public land with wildlife value in this state.

16. The Wayne represents one of the few areas of relatively extensive, continuous forest growth in Ohio and contains a substantial portion of the old-growth forest in the state. The defendants' own studies indicate that there will be an overall loss in forest wildlife habitat in the State as a whole in the future.

17. Under the forest plan adopted by the defendants, almost seventy per cent (70%) of the Wayne has been designated as suitable for timber production. The plan authorizes sale of 75 million board feet over the life of the plan with an annual allowable sale quantity of 7.5 million board feet.

18. The primary method under the plan for taking the forest's trees for sale is clearcutting, a method disfavored by law and regulation and subject to special requirements particularly when undertaken in connection with below cost timber sales. The plan reserves approximately 120,000 acres for so-called even-aged management, mostly clearcutting. Upon information and belief, this represents 80% of the timber base.

19. To facilitate the timber removal the plan allows construction of 8.8 miles of new permanent roads annually along with 6.4 miles of temporary roads per year.

20. Because of the extensive private and state holdings within the boundaries of the Wayne, there already exist approximately 300 miles of state, county and township roads within the Forest. In addition there are approximately 250-300 miles of mineral access roads along with 500 to 1,000 miles of unsurfaced roads. All of these roads are exclusive of roads built by the Forest Service. The defendants failed to adequately consider the extensive roaded areas on private and state lands which coexist with the Wayne. The defendants failed to adequately consider the cumulative environmental and visual impact of the planned new road construction.

21. The timber sales under the plan approved by the defendants are below cost sales. Taxpayers are subsidizing the sale of timber from the Wayne to commercial interests because the defendants are unreasonably, unnecessarily and arbitrarily permitting excessive timbering of the Forest at a loss to the government.

22. In Fiscal Year 1987 total revenues for timber sales in the Wayne were $480,876 while expenses and payments to the states totaled $718,525. In that fiscal year revenues were approximately 67% of costs. In fiscal Year 1988, revenues were $858,017 while expenses and state payments were $1,192,850 meaning revenues were only 72% of costs that year. In fiscal year 1989 revenues were $838,366 while expenses and state payments were $1,074,113 meaning revenues were only 78% of costs that year. Similarly, in fiscal year 1990 revenues were $469,751 while expenses and state payments were $632,757 meaning revenues were 74% of costs.

23. The plan adopted by the defendants is unlawful and arbitrary and capricious because, among other reasons:

(a) the plan places the objective of timber harvesting above all other uses;

(b) the plan fails to meet the "suitability" requirement for timber harvest planning by designating economically and environmentally unsuitable lands for timbering;

(c) the plan lacks site-specific determinations that clearcutting is the "optimal" method of harvesting timber in the Wayne;

(d) the plan fails to demonstrate the optimality of clearcutting as the method of harvesting timber for the Wayne as a whole;

(e) the plan fails to demonstrate that timber harvest will be cost effective and omits any site specific analysis to determine cost effectiveness;

(f) the plan fails to demonstrate that the non-timber use benefits alleged to be achieved through the timber program are really needed.

24. The defendants, arbitrarily and unlawfully, attempted in the plan to justify below cost timber sales by assigning a positive economic value to certain alleged non-economic intangible benefits, particularly wildlife diversity, purportedly associated with the timbering allowed by the plan.

25. The defendants represent in the plan that the timber harvest will benefit wildlife diversity by increasing the early successional habitat (characterized by younger growth, more open uncanopied areas and edging) within the federally-owned portions of the Wayne. This, according to the plan, will promote certain types of wildlife associated with early successional habitats.

26. The defendants arbitrarily and unlawfully disregarded the conditions surrounding the federal holdings in the Wayne which were disclosed in the planning documents as well as the administrative process.

27. Currently, mature, old growth forest with continuous unopen canopy is in short supply in Southeastern Ohio and the rest of the state. The maturing, natural forest areas in the Wayne provide much needed habitat for numerous plant and animal species requiring late successional conditions.

28. There is already an ample supply of early successional habitat in the area of and around the Wayne. Wildlife that requires early successional conditions are overly abundant in the region, a case in point being the white tailed deer. The defendants' planning documents disclose that 131,544 acres of the non-federal land in the area are in pasture, a habitat similar to early successional, whereas 170,220 acres of federal lands are in forest (at various stages of maturity). 77% of the federal lands in the Wayne would have to be deforested to achieve the same amount of open habitat that already exists in the surrounding area.

29. The defendants' failure to properly consider the lands surrounding the Wayne in assigning positive economic values to intangible benefits purportedly to be gained from clearcutting was arbitrary and a major plan defect. The planning deficiency was worsened by the absence of any data derived from study of the Wayne itself pertaining to wildlife and recreation values.

30. The estimated values in the planning documents relating to wildlife and recreation used to justify below-cost sales were not adjusted for local recreational conditions on the Wayne. Instead, values applicable to the 20-state Eastern

Region of the Forests Service were used. The Eastern Region stretches from the Maine Woods to the Ozarks, from the Boundary waters to the Chesapeake Bay. An index of demands for the Region as a whole cannot accurately reflect the local circumstances surrounding the Wayne.

31. Aside from arbitrarily and capriciously assigning positive economic values to the effects of timbering on biological diversity and recreation, the defendants failed to adequately consider or value the detrimental effects of the below-cost timber sales on these and other uses of the Forest which by law are to be given equal weight with timber production.

32. The defendants' plan will actually reduce wildlife diversity by allowing timbering, particularly clearcutting, to disrupt, reduce and fragment the late successional, old growth forest available in Ohio while adding to the overabundance of early successional habitat in the Wayne area.

33. The defendants' plan will actually reduce recreational opportunities in the Wayne. Currently, the Wayne only meets 40% of the demand for primitive forest. The plan adopted by the defendants will reduce the availability of primitive forest.

34. The defendants' plan also arbitrarily assigns positive values for alleged benefits to the local economy from below-cost timber sales. In fact, the plans for below-cost timber sales are detrimental to the local economy which increasingly benefits from tourism associated with the Wayne. The Wayne constitutes a unique recreational opportunity for Ohio and it is ideally located for access by those living in Ohio's major urban areas.

35. In Southeast Ohio the use of land for urban and agricultural purposes has been accompanied by exploitation for purposes of mineral extraction and timbering. Large sections of land have been devoted to strip mining; oil and gas development has also expanded greatly in the past decade. Timber production has occurred on both public and private lands. Despite liberal use of the land in Southeast Ohio for these primary industries, the regional economy is among the worst in the State. Extraction and exploitation have not proven to be reliable sources of stable income or employment. Yet, in disregard of these facts, the defendants justify the below cost sale of timber, in part, as purportedly necessary for the local economy. The defendants know or should know that preservation of the timber base by limiting below cost timbering will better serve the local economy. The unique recreational opportunities offered by the Wayne's mature old growth forest will provide greater economic benefits to the local community.

36. The mineral exploitation in the area of the Wayne has already severely and adversely affected the water supply in the region. The clearcutting under the plan and associated road building will cause increased water run-off during periods of heavy rains and result in increased sedimentation adversely affecting the watershed. The plan and its associated environmental impact study do not contain sufficient data or analysis concerning the plans' impact on water resources. Watershed protection is lacking in the plan as is sufficient discussion of whether there is any current technology which can mitigate the plans' effect on water resources.

37. The plan and its environmental impact statement fails even to assess the cumulative impact of the extensive coal

mining, particularly strip mining, which has been permitted in and around the Wayne for many years.

FIRST CLAIM FOR RELIEF

38. Paragraphs one through thirty-four are realleged and incorporated herein.

39. The actions of the defendants in approving the plan for the Wayne and in directing or permitting below-cost timber sales accomplished by means of clearcutting are in violation of the provisions of federal law enumerated in paragraph one of this complaint. The actions of the defendants threaten imminent and irreparable harm to plaintiff's interests in the use and enjoyment of national and wilderness resources and plaintiff's interests can only be protected by a declaration that the existing plan for the Wayne is inconsistent with law accompanied by an injunction prohibiting further timber sales and clearcutting until the plan and its environmental impact statement are revised, subject to public and administrative review, to bring them into conformity with law.

SECOND CLAIM FOR RELIEF

40. Paragraphs one through thirty-six and realleged and incorporated herein.

41. All of the public lands held by the federal government, including the national forests, are held in trust for the people of the United States. This trust responsibility extends to agencies which administer federal governmental policies and programs concerning such public lands.

42. The defendants' actions in directing or permitting below-cost timber sales in the Wayne under the plan violate the defendants' duties as public trustees.

WHEREFORE, the plaintiff requests:

a) that the Court declare that the plan adopted by the defendants is unlawful as are the below-cost timber sales and timbering, including clearcutting, authorized by the plan; and

b) that the Court issue a preliminary and permanent injunction prohibiting the defendants from permitting or directing further timber harvest and/or below-cost timber sales until the plan has been revised in accordance with law, subject to public and administrative review; and

c) that the plaintiff recover from the defendants its costs, including reasonable attorneys fees, as provided for under the Equal Access to Justice Act, Title 28 U.S.C. section 2412(D) and any other applicable law; and

d) that the Court order such other further relief as may be appropriate.

Respectfully submitted,

/s/Frederick M. Gittes
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APPENDIX H

CONSTITUTIONAL PROVISIONS

Article III, Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. . . .

* * * * *

Article IV, Section 3. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

* * * * *

STATUTORY PROVISIONS

The 1897 Organic Administration Act provides in 16 U.S.C. 475 that:

§ 475. Purposes for which national forests may be established and administered

All public lands designated and reserved prior to June 4, 1987, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

* * * * *

The current version of 16 U.S.C. 500 provides:

§ 500. Payment and evaluation of receipts to State or Territory for schools and roads; moneys received; projections of revenues and estimated payments

On and after May 23, 1908, twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State or Territory in which such national forest is situated, to be expended as the State or Territorial legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such

national forest is situated: *Provided*, That when any national forest is in more than one State or Territory or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein. In sales of logs, ties, poles, posts, cordwood, pulpwood, and other forest products the amounts made available for schools and roads by this section shall be based upon the stumpage value of the timber. Beginning October 1, 1976, the term "moneys received" shall include all collections under the Act of June 9, 1930, and all amounts earned or allowed any purchaser of national forest timber and other forest products within such State as purchaser credits, for the construction of roads on the National Forest Transportation System within such national forests or parts thereof in connection with any Forest Service timber sales contract. The Secretary of Agriculture shall, from time to time as he goes through his process of developing the budget revenue estimates, make available to the States his current projections of revenues and payments estimated to be made under the Act of May 23, 1908, as amended, or any other special Acts making payments in lieu of taxes, for their use for local budget planning purposes.

* * * * *

The Multiple-Use Sustained-Yield Act of 1960, as currently codified in 16 U.S.C. 528-31, provides:

§ 528. Development and administration of renewable surface resources for multiple use and sustained yield of products and services; Congressional declaration of policy and purpose

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The

purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.

§ 529. Authorization of development and administration; consideration to relative values of resources; areas of wilderness

The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528 to 531 of this title.

§ 530. Cooperation for purposes of development and administration with State and local government agencies and others

In the effectuation of sections 528 to 531 of this title and the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

§ 531. Definitions

As used in sections 528 to 531 of this title the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources; each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greater dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

* * * * *

The Knutsen-Vandenberg Act and related Acts, as currently codified in 16 U.S.C 576-76d, provide:

§ 576. Reforestation; establishment of forest tree nurseries; tree planting; seed sowing and forest improvement work

The Secretary of Agriculture is authorized to establish forest tree nurseries and do all other things needful in

preparation for planting on national forests on the scale possible under the appropriations authorized by section 576a of this title: *Provided*, That nothing in this section shall be deemed to restrict the authority of the said Secretary under other authority of law.

§ 576a. Authorization of appropriation for reforestation

There is authorized to be appropriated for each fiscal year after year ending June 30, 1934, not to exceed $400,000, to enable the Secretary of Agriculture to establish and operate nurseries, to collect or to purchase tree seed or young trees, to plant trees, and to do all other things necessary for reforestation by planting or seeding national forests and for the additional protection, care, and improvement of the resulting plantations or young growth.

§ 576b. Purchasers of national-forest timber; deposits of money in addition to payments for timber; use of deposits; seedlings and young trees for burned-over areas in national parks

The Secretary of Agriculture may, when in his judgment such action will be in the public interest, require any purchaser of national-forest timber to make deposits of money, in addition to the payments for the timber, to cover the cost to the United States of (1) planting (including the production or purchase of young trees), (2) sowing with tree seeds (including the collection or purchase of such seeds), (3) cutting, destroying, or otherwise removing undesirable trees or other growth, on the national-forest land cut over by the purchaser, in order to improve the future stand of timber, or (4) protecting and improving the future productivity of the renewable resources of the forest land on such sale area, including sale area improvement operations, maintenance and

construction, reforestation and wildlife habitat management. Such deposits shall be covered into the Treasury and shall constitute a special fund, which is appropriated and made available until expended, to cover the cost to the United States of such tree planting, seed sowing, and forest improvement work, as the Secretary of Agriculture may direct: *Provided*, That any portion of any deposit found to be in excess of the cost of doing said work shall, upon the determination that it is so in excess, be transferred to miscellaneous receipts, forest reserve funds, as a national-forest receipt of the fiscal year in which such transfer is made: *Provided further*, That the Secretary of Agriculture is authorized, upon application of the Secretary of the Interior, to furnish seedlings and/or young trees for replanting of burned-over areas in any national park.

§ 576c. Supplemental National Forest Reforestation Fund; establishment; duration; authorization of appropriations

Notwithstanding any other provision of law, the Secretary of Agriculture shall establish a "Supplemental National Forest Reforestation Fund", and transfer to that fund beginning with the fiscal year commencing July 1, 1972, and ending on September 30, 1987, such amounts as may be appropriated therefor. There is hereby authorized to be appropriated for such purpose for each of the fiscal years during such period the sum of $65,000,000.

§ 576d. Expenditure of Supplemental National Forest Reforestation Fund moneys; availability of moneys from other sources unaffected

Moneys transferred to the National Forest Reforestation Fund under the provisions of sections 576c to 576e of this title shall be available to the Secretary of Agriculture, for

expenditure upon appropriation, for the purpose of supplementing programs of tree planting and seeding of national forest lands determined by the Secretary to be in need of reforestation. Such moneys shall be available until expended, and shall be provided without prejudice to appropriations or funds available from other sources for the same purposes, including those available pursuant to section 576b of this title.

* * * * *

Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by Section 6 of the National Forest Management Act of 1976 and currently codified at 16 U.S.C. 1604, provides:

§ 1604. National Forest System land and resource management plans

(a) Development, maintenance and revision by Secretary of Agriculture as part of Program; coordination

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

(b) Criteria

In the development and maintenance of land management plans for use on units of the National Forest System, the Secretary shall use a systematic interdisciplinary approach to

achieve integrated consideration of physical, biological, economic, and other sciences.

(c) Incorporation of standards and guidelines by the Secretary; time of completion; progress reports; existing management plans

The Secretary shall begin to incorporate the standards and guidelines required by this section in plans for units of the National Forest System as soon as practicable after October 22, 1976 and shall attempt to complete such incorporation for all such units by no later than September 30, 1985. The Secretary shall report to the Congress on the progress of such incorporation in the annual report required by section 1606(c) of this title. Until such time as a unit of the National Forest System is managed under plans developed in accordance with this subchapter, the management of such unit may continue under existing land and resource management plans.

(d) Public participation in management plans; availability plans; public meetings

The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.

(e) Required assurances

In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans--

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528-531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1) of this section, the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management.

(f) Required provisions

Plans developed in accordance with this section shall—

(1) form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents, available to the public at convenient locations, all of the features required by this section;

(2) be embodied in appropriate written material, including maps and other descriptive documents, reflecting proposed and possible actions, including the planned timber sale program and the proportion of probable methods of timber harvest within the unit necessary to fulfill the plan;

(3) be prepared by an interdisciplinary team. Each team shall prepare its plan based on inventories of the applicable resources of the forest;

(4) be amended in any manner whatsoever after final adoption after public notice, and, if such amendment would result in a significant change in such plan, in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section; and

(5) be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years, and (B) in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section.

(g) Promulgation of regulations for development and revision of plans; environmental considerations; resource management guidelines; guidelines for land management plans

As soon as practicable, but not later than two years after October 22, 1976, the Secretary shall in accordance with the procedures set forth in section 553 of Title 5 promulgate regulations, under the principles of Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528-531], that set out the process for the development and revision of the land management plans, and the guidelines and standards prescribed by this subsection. The regulations shall include, but not be limited to—

(1) specifying procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969 [42

U.S.C. 4321 et seq.], including, but not limited to, direction on when and for what plans an environmental impact statement required under section 102(2)(C) of that Act [42 U.S.C. 4332(2)(C)] shall be prepared;

(2) specifying guidelines which—

(A) require the identification of the suitability of lands for resource management;

(B) provide for obtaining inventory data on the various renewable resources, and soil and water, including pertinent maps, graphic material, and explanatory aids; and

(C) provide for methods to identify special conditions or situations involving hazards to the various resources and their relationship to alternative activities;

(3) specifying guidelines for land management plans developed to achieve the goals of the Program which—

(A) insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish;

(B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the

diversity of tree species similar to that existing in the region controlled by the plan;

(C) insure research on and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the land;

(D) permit increases in harvest levels based on intensified management practices, such as reforestation, thinning, and tree improvement if (i) such practices justify increasing the harvests in accordance with the Multiple-Use Sustained-Yield Act of 1960, and (ii) such harvest levels are decreased at the end of each planning period if such practices cannot be successfully implemented or funds are not received to permit such practices to continue substantially as planned;

(E) insure that timber will be harvested from National Forest System lands only where—

(i) soil, slope, or other watershed conditions will not be irreversibly damaged;

(ii) there is assurance that such lands can be adequately restocked within five years after harvest;

(iii) protection is provided for streams; streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes in water temperatures, blockages of water courses, and deposits of sediment, where harvests are likely to seriously and adversely affect water conditions or fish habitat; and

(iv) the harvesting system to be used is not selected primarily because it will give the greatest dollar return or the greatest unit output of timber; and

(F) insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an even-aged stand of timber will be used as a cutting method on National Forest System lands only where—

(i) for clearcutting, it is determined to be the optimum method, and for other such cuts it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan;

(ii) the interdisciplinary review as determined by the Secretary has been completed and the potential environmental, biological, esthetic, engineering, and economic impacts on each advertised sale area have been assessed, as well as the consistency of the sale with the multiple use of the general area;

(iii) cut blocks, patches, or strips are shaped and blended to the extent practicable with the natural terrain;

(iv) there are established according to geographic areas, forest types, or other suitable classifications the maximum size limits for areas to be cut in one harvest operation, including provision to exceed the established limits after appropriate public notice and review by the responsible Forest Service officer one level above the Forest Service officer who normally would

approve the harvest proposal: *Provided*, That such limits shall not apply to the size of areas harvested as a result of natural catastrophic conditions such as fire, insect and disease attack, or windstorm; and

(iv) such cuts are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource.

(h) Scientific committee to aid in promulgation of regulations; termination; revision committees; clerical and technical assistance; compensation of committee members

(1) In carrying out the purposes of subsection (g) of this section, the Secretary of Agriculture shall appoint a committee of scientists who are not officers or employees of the Forest Service. The committee shall provide scientific and technical advice and counsel on proposed guidelines and procedures to assure that an effective interdisciplinary approach is proposed and adopted. The committee shall terminate upon promulgation of the regulations, but the Secretary may, from time to time, appoint similar committees when considering revisions of the regulations. The views of the committees shall be included in the public information supplied when the regulations are proposed for adoption.

(2) Clerical and technical assistance, as may be necessary to discharge the duties of the committee, shall be provided from the personnel of the Department of Agriculture.

(3) While attending meetings of the committee, the members shall be entitled to receive compensation at a rate of $100 per diem, including travel time, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5 for persons in the Government service employed intermittently.

(i) Consistency of resource plans, permits, contracts, and other instruments with land management plans; revision

Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Those resource plans and permits, contracts, and other such instruments currently in existence shall be revised as soon as practicable to be made consistent with such plans. When land management plans are revised, resource plans and permits, contracts, and other instruments, when necessary, shall be revised as soon as practicable. Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights.

(j) Effective date of land management plans and revisions

Land management plans and revisions shall become effective thirty days after completion of public participation and publication of notification by the Secretary as required under subsection (d) of this section.

(k) Development of land management plans

In developing land management plans pursuant to this subchapter, the Secretary shall identify lands within the management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible, as determined by the Secretary, and shall assure that, except for salvage sales or sales necessitated to protect other multiple-use values, no timber harvesting shall occur on such lands for a period of 10 years. Lands once identified as unsuitable for timber production shall continue to be treated for reforestation purposes, particularly with regard to the protection of other multiple-use value. The Secretary shall review his decision to classify these land as not suited for timber production at least every 10 years and shall return these lands to timber production whenever he determines that conditions have changed so that they have become suitable for timber production.

(l) Program evaluation, process for estimating long-term costs and benefits; summary of data included in annual report

The Secretary shall—

(1) formulate and implement, as soon as practicable, a process for estimating long-terms[1] costs and benefits to support the program evaluation requirements of this subchapter. This process shall include requirements to provide information on a representative sample basis of estimated expenditures associated with the reforestation, timber stand improvement, and sale of timber from the National Forest System, and shall provide a comparison of

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[1] So in original. Probably should be "long-term."

these expenditures to the return to the Government resulting from the sale of timber; and

(2) include a summary of data and findings resulting from these estimates as a part of the annual report required pursuant to section 1606(c) of this title, including an identification on a representative sample basis of those advertised timber sales made below the estimated expenditures for such timber as determined by the above cost process; and

(m) Establishment of standards to ensure culmination of mean annual increment of growth; silvicultural practices; salvage harvesting; exceptions

The Secretary shall establish—

(1) standards to insure that, prior to harvest, stands of trees throughout the National Forest System shall generally have reached the culmination of mean annual increment of growth (calculated on the basis of cubic measurement or other methods of calculation at the discretion of the Secretary): *Provided*, That these standards shall not preclude the use of sound silvicultural practices, such as thinning or other stand improvement measures: *Provided further*, That these standards shall not preclude the Secretary from salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow or other catastrophe, or which are in imminent danger from insect or disease attack; and

(2) exceptions to these standards for the harvest of particular species of trees in management units after consideration has been given to the multiple uses of the

forest including, but not limited to, recreation, wildlife habitat, and range and after completion of public participation processes utilizing the procedures of subsection (d) of this section.

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No. 97-16

In The

Supreme Court of the United States

October Term, 1996

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

vs.

SIERRA CLUB, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS SIERRA CLUB AND CITIZENS COUNSEL ON CONSERVATION AND ENVIRONMENTAL CONTROL

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QUESTIONS PRESENTED

The following questions correspond more accurately than those in the petition to the statutory and regulatory framework of this case and the issues raised by the record and decision below.

1. Does a court challenge by frequent forest users (who have exhausted internal administrative appeals allowed by agency regulations) to the final decision of the Forest Service adopting a plan for the Wayne National Forest which controls all activity in the Forest, sets timbering goals, and makes binding determinations of the suitability of lands for timbering present a justiciable question when ongoing projects implemented under the Plan adversely affect those challenging the Plan?

2. Did the Sixth Circuit Court of Appeals err in finding that it is arbitrary and capricious for the Forest Service to adopt a final plan for the Wayne National Forest which favors timbering over recreational and other uses of the Forest when the record reveals that the Forest Service: (A) knowingly undervalued the demand for non-motorized recreational activities inconsistent with timbering, despite the warnings of the Service's own panel of experts; (B) disregarded conditions extant on private and State lands interspersed with and surrounding the Wayne; and (C) failed to consider a reasonable range of alternatives as required by the National Environmental Protection Act and Forest Service regulations.

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CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions included in Appendix H to the petition, the pertinent regulations are reprinted in Appendix A to this Brief in Opposition.

STATEMENT OF THE CASE

This case involves a challenge to the Forest Plan for the Wayne National Forest (hereinafter "Forest" or "Wayne"). The Wayne Plan was required by the National Forest Management Act (hereinafter "NFMA"), which was enacted in 1976. NFMA significantly changed the standards governing the National Forests without repealing pre-existing laws, such as the Multiple Use Sustained Yield Act ("MUSYA"), 16 U.S.C. §§ 528-531 and the Forest Service Organic Act, 16 U.S.C. § 475.

The NFMA, and regulations adopted thereunder, contain numerous substantive and procedural requirements for the development of forest plans. Further, The NFMA expressly directs that forest plans are to control all activities in a forest:

> Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the Land Management Plans.

16 U.S.C. § 1604(I).

The Forest Service's regulations also reflect the controlling nature of the forest plan:

> Plans guide all natural resource management activities and establish management standards and guidelines for the National Forest System. They determine resource

> management practices, levels of resource production and management, and the availability and suitability of lands for resource management.

36 C.F.R. Chapter 2, § 219.1(b).

This case, brought under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), challenges the Forest Service's failure to comply with its obligations under the NFMA and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332.

A. The Forest Planning Process.

The NFMA directs the Forest Service to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." 16 U.S.C. § 1604. Although some policies and procedures are established nationally or regionally, the forest is the base unit for making resource allocation and management decisions. Plans must be developed by an interdisciplinary team integrating relevant sciences and disciplines into the planning process. 16 U.S.C. § 1604(b); 36 C.F.R. § 219.5. After reconciling competing demands for forest uses, each forest plan establishes the rules for managing the forest for up to 15 years. 16 U.S.C. § 1604(b).[1]

Because Congress recognized that forest plans could have significant effects on the environment, the NFMA requires that forest plans must also be developed in accordance with the procedural requirements of the NEPA, 16 U.S.C. § 1604(g)(1); 36 C.F.R. § 219.10(b). A programmatic environmental impact statement must be prepared for each forest plan to ensure that its

1. Other statutory obligations are also integrated into the development of forest plans. Thus, forest plans must provide for multiple use and sustained yield of products and services in accordance with the MUSYA which requires forests to coordinate outdoor recreation, range, timber, watershed, wildlife, and fish uses. 16 U.S.C. § 1604(e).

cumulative impacts are fully assessed before the plan is put into place. The NFMA regulations spell out alternatives that must be analyzed in the environmental impact statement to provide the most complete information about the environmental and resource consequences of competing resources and environmental uses. *See, e.g.*, 36 C.F.R. § 219.12(f).

The Forest Service analyzes the environmental effects of particular site-specific actions at a later stage, but that analysis refers back to the forest plan and Environmental Impact Statement for decisions made and assessed previously. This is in keeping with the NEPA "tiering" regulations, which instruct agencies "to focus on the actual decisions ripe for decision at each level of environmental review" and to "exclude from consideration issues already decided." 40 C.F.R. §§ 1502.20, 1508.28.

B. On-the-ground Decisions Made In Forest Plans.

Forest plans are not merely hortatory documents containing statements of future intent. Rather, they make critical, binding decisions that have on-the-ground effects.

At the outset, a forest plan divides the forest into various land classifications that will be managed to protect or promote different uses of forest resources. Some classifications immediately impose an environmentally protective regime. For example, forest plans recommend for or against designation of undeveloped areas as wilderness under the Wilderness Act, 16 U.S.C. §§ 1133-1136, as wild and scenic rivers under the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287, and as national trails closed to motorized traffic under the National Trails System Act, 16 U.S.C. §§ 1241-1249. Areas may also be designated as research natural areas because they have special or unique characteristics of scientific interest. 36 C.F.R. § 219.25. Upon any of these designations, the lands are deemed unsuitable for timber production, *id.* § 219.14(a)(4), (c)(1), and are managed to protect the characteristics that led to the recommended protective treatment, generally

foreclosing commercial exploitation of the resources. *See* Wild and Scenic Rivers Act, 16 U.S.C. § 1283(a); *California v. Block*, 690 F.2d 753, 758, 760, 762 (9th Cir. 1982) (the wilderness character of undeveloped areas may not be changed until the Forest Service recommends against a wilderness designation).

Critical habitat for endangered and threatened species is identified in the plan and set aside for special management to ensure the viability of such species. 36 C.F.R. § 219.19(a)(7). Because forest plans may affect the viability of endangered and threatened species, the Forest Service routinely consults with wildlife agencies pursuant to the Endangered Species Act, 16 U.S.C § 1536, to ensure that the plans will not jeopardize the continued existence of such species or destroy their habitat. *See Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Lane County Audubon Society v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992). Other areas must be managed specially to ensure the viability of other wildlife species. 36 C.F.R. § 219.19. In defining the amount of habitat that will receive special protection, and the protection that will be afforded, a forest plan dictates the extent to which various species will thrive, persist, or falter.

Forest plans also decide whether off-road vehicles will be permitted on each road in the forest. 36 C.F.R § 219.21(g). Even where off-road vehicles are permitted, the plan imposes restrictions on such activities to minimize damage to soil, vegetation, waters, and wildlife habitat and to ensure public safety. *Id.*

After designating some areas as subject to environmentally protective regimes, and thus off-limits to certain resource production activities, forest plans also determine which remaining lands are suitable for resource production activities, such as grazing, logging, and oil and gas leasing. 16 U.S.C. §§ 1604(g)(2)(A), (k). With respect to grazing, the plan determines whether lands will be available for grazing or withdrawn for restoration or other purposes, such as providing habitat to sustain particular species. 36 C.F.R. § 219.20. With respect to logging, the forest plan determines

whether lands are physically or economically unsuitable for logging because available technology will irreversibly damage soil, slope, or other watershed conditions, 16 U.S.C. § 1604(g)(3)(E)(I), or will cause serious damage to water conditions or fish habitat. *Id.* § 1604(g)(3)(E)(iii); 36 C.F.R. § 219.14(a)(2). Lands may be deemed tentatively unsuitable where logging would be incompatible with other management objectives, such as maintaining diversity of plant and animal communities, preserving tree diversity in the region, or protecting water quality or wildlife habitat. 36 C.F.R. § 219.14(c); *see also* 16 U.S.C. § 1604(g)(3)(B); 36 C.F.R. §§ 219.26, 219.27(g) (diversity requirements). No logging may occur on such lands for a period of ten years. 16 U.S.C. § 1604(k); 36 C.F.R. §§ 219.14(d), 219.27(c)(1).

Based on the land base remaining after excluding unsuitable lands and those withdrawn to protect particular environments or wildlife, the forest plan establishes an annual logging level that will achieve a perpetual sustained yield. 16 U.S.C. § 1611. This level, known as the allowable sale quantity ("ASQ"), may not be exceeded over the period covered by the plan, except for salvage sales. *Id.* Based on this level, forest plans establish a timber sale schedule to ensure a sustained yield, often specifying the location, acreage, volume, road-building requirements, and logging methods for the sales. 36 C.F.R. § 219.16.

After dividing the forest into management areas, the forest plan prescribes management regimes for each area. Thus, wilderness areas, endangered species habitat, and wetlands are managed differently than lands designated for grazing or logging. *Id.* §§ 219.18, 219.23(f).

The plans also regulate the manner in which resource protectional activities will be conducted. Permissible timber management and logging methods are specified in the plan. 16 U.S.C. § 1604(g)(3)(D), (F); 36 C.F.R. § 219.27(d). *Also see* 36 C.F.R. § 219.27(e).

C. The Mandatory Role Of Forest Plans In Forest Decision-making.

As noted earlier, all site-specific activities in the forest must comply with the forest plan and all resource plans, permits, contracts, and other instruments related to the use of the forest must be consistent with the plan. 16 U.S.C. § 1604(I); 36 C.F.R. § 219.10(e). Decisions made in the forest plan are not revisited when the Forest Service makes subsequent project-level decisions. Instead, the core decision at the site-specific stage is whether the particular action is consistent with the forest plan.

In refusing to consider a wilderness alternative for one site in the Idaho Panhandle National Forest, the Forest Service explained its bifurcated decision-making process:

> The administrative procedures for evaluating possible Wilderness recommendations are separate from the procedures employed to consider specific land management activities. As defined by 36 CFR Part 219, possible wilderness recommendations are evaluated during the forest planning process. According to these regulations, the Forest Service determines the general, programmatic management direction for each National Forest during the initial development and subsequent revision of Forest Plans. . . . It is during this programmatic step in the Forest Service's decision-making process that the agency determines which lands to recommend to Congress for inclusion in the National Wilderness Preservation System.

Idaho Conservation League v. Mumma, 956 F.2d 1508, 1516 n.17 (9th Cir. 1992) (quoting Forest Service documents). Another Forest Service document emphasized that decisions made at the

forest planning level are excluded from project-level decision-making and cannot be appealed at that stage:

> During the development of the Idaho National Forest Plan the decision was made to manage specific areas as roadless and undeveloped. The former Skitwish Ridge Roadless Area #01135, which is approximately 6300 acres in size, was not one of these areas, and I am not revisiting the land allocation decisions made in the Forest Plan.

Id.

In sum, forest plans establish the rules for managing the forest. Once those parameters are set, they control forest management decisions for the ten- to fifteen-year duration of the plan.

In light of the controlling nature of a forest plan, it is not surprising that the NFMA also established a comprehensive system of public involvement in the development of forest plans to ensure that the decisions in the plan are thoroughly aired and considered before they are finally made. 16 U.S.C. § 1604(d). *See also* 36 C.F.R. § 219.6. In fact, in recognition of the impact of the forest plan on all operations and activities in a forest, the NFMA also required that there be an independent public review as to any amendment or revision of the plan. 16 U.S.C. § 1604(f). Independent of the regulatory provisions for public participation in the planning process, there are separate administrative procedures which have been established to permit the appeal of decisions to approve a forest plan. 36 C.F.R. § 217.1

D. The Wayne Plan.

The deciduous hardwood forest of the Wayne includes a great

portion of Ohio's last remaining older forest and provides a broad diversity of plant and animal species, including many species considered by the State of Ohio to be threatened or endangered. JA at 520. [2] Only 4% of Ohio's publicly-held lands are available for recreation, and the Wayne comprises much of it. The Wayne also constitutes 24% of Ohio's publicly-owned land with wildlife value. JA at 968. The Forest boundaries encompass three different forest units, which included, as of 1985, 822,953 acres. The National Forest System is authorized to acquire land within the purchase boundaries of the Forest. As of 1985, when the Plan was issued, the Forest owned 177,761 acres or 21% of the land area within the boundaries. JA at 572.

The planning process for the Wayne began in 1981 and continued for a period of five years. The proposed plan and Draft Environmental Impact Statement (DEIS) were published in 1986. The Forest Service adopted the Final Plan on January 4, 1988, accompanied by a Record of Decision (ROD) and Final Environmental Impact Statement ("FEIS"). JA at 48. The Plan has been in effect since that date. The Forest Service has announced that in 1999 it will develop a new plan for the Wayne since the current plan is due to expire and is premised on out-dated information.

The Plan designated 126,107 acres of the Forest to be included in the timber base, the portion of the Forest from which timber could be removed or cut. This meant 75% of the total net Forest area was designated as suitable timber base. JA at 68. According to the planners, 75% of the net Forest would be cut over the planning horizon of 50 years. During the 10-year life of the Plan, 7.5 million board feet of timber could be cut per year. By the fifth decade, planners determined that over 16 million board feet would be cut each year, an increase of over 100%. R.14, Plan Table 4-1. The Plan designated even-aged management techniques as the primary

2. References, where possible, are to the Joint Appendix (JA) in the Court below. Otherwise, citations are to the record (R) and particular document in the record.

method of timber management (80% of all timbering).[3] JA at 815 and 970 and FEIS at 1-9. *See also* R.14, Plan, App. A, Table Only.

Pursuant to the regulations, the Plan included an implementation schedule. "The implementation schedule is a formulation of site-specific projects and activities which will carry out the Forest Plan directions." JA at 982. "The schedule will include all proposed projects including names, locations, and dates of execution." R.14 Plan at 5-2. While the complete implementation schedule is maintained at the Forest office, the Plan Appendix included a table of planned timber sales for the first three years of the Plan. JA at 984-988.

Aside from designating the suitable timber base, proposed timber management techniques and allowable sales quantities, the Wayne Plan divided the Forest into management areas with prescriptions and directions controlling all activity and management action in the area. R.14, Plan 4-63-4-181. In connection with designating the various management areas, the Plan made numerous other determinations for the Forest. For example, the Plan determined the total forest area to be available for semi-primitive, non-motorized recreation opportunities and, as a result, the level of demand for such conditions the Forest could meet. R.14, Plan at 3-3 and Table 4-1. Similarly, the Plan prescribed the total number of temporary and permanent roads to be built as well as roads to be closed. The Plan determined the total area and location of forest land on which off-road vehicle use would be permitted. R. 14, Plan at 3-6.

The Wayne Plan designated 5,530 acres for study as Candidate Special Areas and Research Natural Areas (called management area

3. Even-aged management involves the application of a combination of actions that result in the creation of stands in which trees of essentially the same age grow together. This is typically accomplished by removing the trees in a designated area all at once or in successive stages close in time. Even-aged management includes three techniques; clearcutting, shelterwood cutting and seed tree cutting. Controlled burns are used to the same effect.

9.2), which resulted in limitations on the uses of those portions of the Forest. The Plan also indicated the number of developed recreation sites and miles of trails to be constructed in management areas. R.14, Plan Table 4-19. The Plan also provided detailed, mandatory guidelines as to operational standards for management practices. For example, the Plan defined the size of buffer zones between logging activities and streams and other watershed. The Plan also established monitoring and evaluation programs for the Wayne based on the 17 management indicator species designated in the Plan. JA at 1000.

The Wayne Plan also made it clear that Plan decisions and determinations would not be revisited as to specific projects. Because of the "tiering" of decision-making adopted as part of the Plan, the scope of future decision-making and environmental analyses "will be narrowed." *See, e.g.*, R. 14, Plan at 5-20.

E. The Proceedings Below.

While this case was pending in the Court of Appeals, two timber sales were undertaken in the Wayne, the Bluegrass and the Markin Fork projects.

Logging (and burns) for the Bluegrass project has been 50% completed. Subsequently, the Court of Appeals issued its decision and remanded this case to the District Court. Prior to the remand, the issue of individual standing had never been contested in the District Court, and the record was devoid of any evidence concerning the particular uses of the Wayne made by the members of the plaintiff organizations. Similarly, there had been no evidence adduced concerning the particular, individual injuries claimed by the plaintiffs.

On August 26, 1997, in light of the remand, the respondents filed with the District Court a renewed motion for summary judgment, including three affidavits of members of the respondent organizations, detailing their frequent use of the Forest, the purposes

of their Forest visits and the impact of the Plan and the recently-initiated timber projects on their activities. The three affidavits presented before the District Court included the declarations of David A. Scott, Stephen Ostrander, and Jason Tockman.

Mr. Ostrander is a Sierra Club member and journalist who is authoring a revised, expanded version of a previously-published guide to nature preserves in Ohio and Pennsylvania. Mr. Ostrander also lives a short distance from the Wayne. For personal recreation and to support his work as an author, he hikes throughout the Wayne, including the areas included in the timber base and the areas currently being timbered under the Plan.

David A. Scott, a Board member of the Ohio Sierra Club, heads the organization's Outings Committee, which has led hikes in many areas of the Wayne. Mr. Scott, who anticipates leading future hikes in the Wayne, makes it clear in his declaration that the hikes in the Wayne led by the Sierra Club in the past and those contemplated for the future traverse areas of the Forest presently included in the timber base.

Mr. Tockman, a member of the Citizens Council, lives close to the Forest and does research on the Wayne for his master's degree in environmental studies at Ohio University. Mr. Tockman is employed by the Buckeye Forest Council to hike throughout state and national forest areas, including the Wayne. Mr. Tockman's declaration makes it clear that he routinely hikes the Wayne for purposes of research, personal recreation, and his employment. He hikes the areas presently opened to timbering under the Plan, including the areas encompassed by the two timber projects encompassed in the Bluegrass and Markin Fork timbering projects.

SUMMARY OF ARGUMENT

This case does not present the conflict as to justiciability petitioner suggests. Developments which have occurred after submission of the case to the Court of Appeals (highlighted by

recent filings in the District Court) demonstrate that this is a justiciable controversy even accepting the petitioner's views of standing and ripeness. Besides the fact that this case does not present the question, there are two reasons the Court may not need to address the justiciability of forest plans at this time. First, this Court's decision in *Bennett v. Spear*, 117 S. Ct. 1154 (1997) provides guidance not previously available which may resolve any conflicts. In addition, the Forest Service recently announced its decision to review and revise its regulations governing the forest planning process and forest plans. The future content of the regulations is likely to be more specific as to the role of forest plans indicating and authorizing ground disturbing projects.

The petitioner's arguments regarding the merits rest on a total disregard for the factual bases of the decision of the Court of Appeals. By focusing almost exclusively on *dicta* in the Court of Appeals' decision, petitioner attempts to create the false impression that the decision below rests on criticism of Congressional legislation affecting the operations of the Service, as well as the Court's conclusion that a particular method of timbering — clearcutting — was permissible only in exceptional circumstances. In fact, the Court of Appeals' finding that the Wayne Plan was arbitrary and capricious rested on evidence in the record regarding the conduct of the Forest Service in development of the plan and its conclusions were independent of the propriety of the use of clearcutting in the Wayne.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT THE STANDING AND RIPENESS QUESTIONS SUGGESTED BY PETITIONER.

A. Justiciability Is Not A Question As To The Wayne Plan.

The petitioner contends this case presents the Court with an opportunity to resolve disagreement between the Eighth and Eleventh Circuit Courts of Appeals, and the Sixth, Seventh, and Ninth Circuit Courts of Appeals as to the justiciability of challenges to forest plans before site-specific actions have begun under the plans. However, there is *no* disagreement among the Courts of Appeals as to the justiciability of such plans once site-specific action is taken. In suggesting that this case presents a conflict, petitioner omitted from its Petition crucial developments which began after the case had been submitted to the Court of Appeals.

The Eighth and Eleventh Circuits premised their conclusion that challenges to forest plans are not justiciable because of their view that the adoption of the Forest Plan "does not dictate the occurrence of, nor serve as the final authorization for, any ground-disturbing project (and its environmental impacts and injuries)." Pet. at 3-4. As is apparent from the discussion contained in the Statement of the Case above, this is an extremely myopic and distorted understanding of the actual contents and effects of forest plans. Nevertheless, even these courts have made it clear that once ground-level projects are begun pursuant to a forest plan, there is no question that challenges to a forest plan by individuals or groups affected by the ongoing projects are justiciable. As the Eleventh Circuit emphasized:

> We are persuaded by appellees' contention that no site-specific action will be taken pursuant to the Plan without a second stage of decision-making; 'subsequent

> discretionary actions require separate and independent decision-making' before any site-specific action will occur. Appellees concede that appellants can challenge both the site-specific action as well as the Plan-level decisions underlying the specific action of the second stage. Our opinion is dependent on that concession. . . .
>
> * * *
>
> As the district court stated, '[This] court's determination that plaintiffs lack standing at this time to assert their claims made herein is *ipso facto* a determination that ... such time as the Plan is implemented in a specific way, it will not be too late to complain.'

Wilderness Society v. Alcock, 83 F.3d 386, 390, 390 n.8 (11th Cir. 1996) (citations and footnotes omitted).

As described in the Statement of the Case above, that is now the situation presently confronting the District Court on remand. The respondents who originally challenged the Plan to prevent its implementation, including the portion of the Plan governing timbering, have now submitted affidavits addressing standing issues which confirm that two timber sale projects have proceeded under the Plan. These affidavits also indicate that these projects (one of which is 50% completed) are in areas used by the respondents. In addition, the affidavits confirm that the decision to proceed with these projects relied on the earlier controlling decision of the Plan to include the project areas in the suitable timber base. As a result, this case does not present the question suggested by Petitioner.

B. Ripeness And Forest Plans.

While this case, factually, no longer presents the conflict suggested by petitioner, it does highlight one of the reasons the court below and other circuits have found forest plan challenges justiciable at the time of the adoption of a forest plan. The reality is that forest plans do contain numerous decisions that will, with certainty, affect forest users both before and after "ground-disturbing" activities are initiated under the plan.

It has been the real world consequences of forest plans, and the need to ensure compliance with procedural requirements in the NFMA and NEPA, which led several courts of appeals to conclude that challenges to forest plans are generally justiciable. In *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992), the court addressed the decision of the Forest Service to recommend against Wilderness designation for 43 of 47 roadless areas in the Idaho Panhandle National Forest. As here, the decision was challenged on several grounds, including procedural violations of NEPA. The Ninth Circuit concluded:

> Viewed in this light, and whether or not it is irrevocable, the Service's decision is harmful for standing purposes. The ICL's complaint is that the faulty EIS has made possible development that wilderness designation would have prevented. Pursuant to NEPA and the NFMA, these are injuries that we must deem *immediate*, not speculative. Indeed, short of assuming that Congress imposed useless procedural safeguards, and that wilderness designation is a superfluous step, we must conclude that the management plan plays some, if not a critical, part in subsequent decisions.
>
> More importantly perhaps, if the agency

> action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that the plan predetermines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never.

Idaho Conservation League v. Mumma, *supra*, at 1516 (emphasis in original).

The Seventh Circuit's conclusion in *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995) echoed similar concerns:

> . . . [A]s the district court points out, the regulations regarding forest management plans speak in mandatory terms. * * * The plans clearly require certain projects to be undertaken and indicate what their effects may be. * * * That the Service has yet to actively *inflict* the injury through the development of site-specific projects does not render the injury 'conjectural' or 'speculative' and therefore does not deprive plaintiffs of standing to challenge the plan.' * * * As the Supreme Court noted in the very sentence before it created the 'certainly impending' language on which the defendants rely, '[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.'

Sierra Club v. Marita, *supra*, at 611-612 (citations omitted, emphasis in original).

The Seventh Circuit in *Marita* also relied on *Lujan v. Defenders of Wildlife*, in which this Court stated:

> There is much truth to the assertion that 'procedural rights' are special: the person who has been accorded a procedural right to protect his concrete interest can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case-law, one living adjacent to the site for proposed construction of a federally-licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Lujan v. Defenders of Wildlife, 112 S. Ct. 2114, 2143 n.7 (1992).

The Plan in this case involved challenges to both procedural and substantive decisions that had immediate impact upon the Plan's adoption. For example, in this case, 75% of the net Forest area was deemed suitable for timbering upon adoption of the Plan. With that decision these Forest areas lost protection and were opened to logging. Subsequent timber projects proceeded without revisiting the question of suitability for inclusion in the timber base because the matter had already been determined in the Plan. Nor was there ever a question of the Forest Service's intention to proceed with the Plan. Forest Service regulations require a schedule for implementing the Plan, and the Wayne Plan, like most, contained a chapter on implementation including implementation schedules.

The challenge to the Wayne Plan also involved non-compliance with requirements of NEPA. The heart of any environmental impact

statement under NEPA is the alternatives which are considered. *See* 40 C.F.R. § 1502.14. Alternatives presented in connection with the Wayne Plan failed to provide a reasonable or broad range of alternatives as required. Alternatives are intended to sharply define the issues and trade-offs, and provide a clear basis for choice. This should reflect all feasible and realistic approaches to resolving key issues. The alternatives actually presented consisted of very similar proposals on the key planning issues.

Certain issues were identified by Wayne planners at the outset of the planning process to be of great concern. Among these issues were the extent of the Forest to be designated as suitable for timbering, and closely related, the rotational period for timbering that would be permitted (controlling how often and when timber is harvested). Another key concern related to the ability of the Forest to meet the demand for semi-primitive recreational opportunities. Examining the alternatives presented, it was apparent that the alternatives did not present the decision-makers or the public with a broad range of choices concerning the amount of Forest land designated as suitable for timbering.

Alternative 7 (which emphasizes a low-intensive management) declares 90% of the Forest as unsuitable for timber production. JA at 673. The next closest alternative (Alternative 5) designates only 20% of the Forest as unsuitable. The effects of alternatives spanning the gap between 90% and 20% are important for the decision-maker and public to understand, yet there was simply no alternative that presented any choice between these extreme variances.

Another example of the lack of meaningful alternatives was the rotational periods in the Plan. Shorter rotational periods mean more frequent disturbances will occur from timber harvests. Rotational periods affect not only the timing of harvests and associated regenerations, but the likelihood that recreational users will be subjected to disturbances or interruptions, as well as activities which diminish the aesthetic values of the Forest. Despite the importance of the issue, 160-year rotations are never applied to

more than 6% of the Forest in any alternative, even though the public expressed the desire for the big trees and low-level disturbances that will result from longer rotations. The Forest Service never explained its reasons for not including greater amounts of 160-year rotations in the alternatives. Yet, both the reasons and greater choices are essential for the decision-maker and the public to fully understand the range of choices to be applied in the Wayne. DEIS Table 2-15.

Similarly, the alternatives failed to offer a meaningful range of choices regarding the area of the Forest to be dedicated to semi-primitive recreational opportunities. The total area providing semi-primitive recreation is never more than 22% of any alternative, even though the Forest Service admitted that semi-primitive conditions are scarce in Southeastern Ohio, JA at 694, and the role of the National Forest lands is to provide benefits that cannot be supplied by private lands. JA at 968. The Forest Service conceded that it could not meet the demand for semi-primitive forest recreational opportunities, and there were numerous comments to the Forest Service expressing concern and desire for enhancement for semi-primitive recreational opportunities in the Forest.[4]

It is important to note that the planners' violations of NEPA and the excessive timber base set by the Plan are unrelated to the method of timbering. In fact, even if even-aged management techniques had not been chosen, the plan's overinclusive timber base and inadequate range of alternatives would call into question any logging project. In light of the facts, the Court of Appeals did not err in deciding to hear this case.

C. The Decision Of The Court In *Bennett v. Spear* Provides New Guidance Unavailable Previously.

This Court, only this year, issued a decision which should

4. In fact, Forest planners acknowledged a state-wide shortage of forest-type recreational opportunities and that only 50% of the demand for such recreational opportunities was being met state-wide. JA at 576.

provide guidance to resolve any actual conflicts among the circuits regarding the justiciability of forest management plans. Those decisions which have concluded that challenges to forest plans are not justiciable before site-specific projects are initiated have focused on the "immediacy" component of this Court's standing and ripeness decisions. In these cases, the crucial issue for the Court appears to be that the forest plan may be, in some circumstances, one or two steps up the chain of causation from the final event that injures the plaintiff.

This Court's recent decision in *Bennett v. Spear*, 117 S. Ct. 1154 (1997), makes clear that this narrow focus on identifying — and insisting that the plaintiff must wait for — the last event in the causal chain in order to establish justiciability is incorrect. In *Bennett*, this Court rejected the government's position that a final biological opinion causes no injury that is traceable; the Court observed that the government's position "wrongfully equates injury fairly traceable to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Id.* at 1164. The Court concluded that its decisions do not exclude from justiciability controversies situations where the injury complained of "is produced by determinative or coercive effect upon the action of someone else." *Id.*

These statements in *Bennett* make clear that a focus on the presence or absence of the last link in a causal chain in order to determine the justiciability of a forest plan challenge overlooks those situations where the injury is occasioned by the coercive or determinative effects of an action several steps up the chain. Because forest plans are legally binding on all subsequent activities in a forest, and because the decision to proceed with these activities is made by the Forest Service, not some independent third party, a coercive or determinative effect exists when the Forest Service adopts a forest plan. The court's decisions do not require plaintiffs to wait until the other shoe falls to pursue such a claim.

In *Bennett*, the Court dealt with a biological opinion which

would have the effect of forcing the Bureau of Reclamation to maintain higher minimum water levels in the Klamath Irrigation Project. The Court in *Bennett* accepted the proposition that the plaintiffs in that case must show that they would receive less water in order to establish injury. However, the Court did not determine that the *Bennett* plaintiffs needed to wait until they were actually deprived of the water before they could bring to court the challenge to the biological opinion that would affect their water supply. Instead, this Court concluded that only evidence of the coercive effect of that biological opinion upon the water supply was necessary, not its implementation.

The Wayne Plan presents a similar situation. The Forest Plan has a determinative effect on all future actions of the Forest Service. In this dispute, the respondents have asserted, *inter alia*, that the suitable land decision in the Wayne Plan was made using an improper analysis. *Any* decision to proceed with a timber sale on lands classified as suitable under this incorrect analysis will injure the respondents because a proper analysis could have eliminated those acres from the suitable land base. Presumably, the Forest Service did not prepare the plan simply to discard it, and some decision to proceed with a timber sale was expected to and did occur. Under these circumstances, the respondents need not await the "very last step in the chain of causation." *Bennett* at 1164.

The combination of NEPA violations and the arbitrary application of NFMA and related regulations reflected in the Plan set in motion and dictated events which injure the respondents' interests in the Wayne.

D. Recent Events Will Alter Fundamentally The Regulatory Framework For This Case.

On August 15, 1997, the Secretary of Agriculture announced the formation of a Committee of Scientists to "provide scientific and technical advice to the Secretary of Agriculture and the Chief of the Forest Service on improvements that can be made to the

land and resource management planning process." 62 Fed. Reg. 43691 (August 15, 1997). The Committee's charter includes the following directions:

> The Committee of Scientists shall also provide technical advice on the land and resource management planning process and provide materials for the Forest Service to consider for incorporation into the revised planning regulations.

Id. Previously in 1995, the Department of Agriculture proposed extensive revisions to the forest planning regulations adopted to implement the National Forest Management Act. *See* 60 Fed. Reg. 18886, *et seq*. These proposed revised planning regulations and the formation of a Committee of Scientists to recommend further revisions indicate that the NFMA regulations will undergo a major overhaul in the near future.

At the same time, the aspects of the decision in this case raised in the petition are based on *existing* NFMA regulations. For example, it is the existing regulations that lead petitioners to argue (albeit incorrectly) that "[a]doption of a forest plan does not dictate the occurrence of, nor serve as the final authorization for, any ground-disturbing project (and its environmental impacts and injuries.)" Pet. at 3-4 (citing and discussing regulations). Even if petitioner was correct in this view there is nothing in the NFMA itself that would preclude a revision of the regulations to establish an explicit requirement that some or all ground-disturbing activities must be identified and authorized in the forest plan. The controversy in this case over what a forest plan does, and whether a challenge to it when it is first adopted is justiciable, turns on the language of the current NFMA regulations and differing views about what these regulations accomplish.

The pending revision of the NFMA planning regulations will fundamentally alter the issues raised in the petition.

II. THE COURT OF APPEALS DECISION RESTED ON FACTUAL EVIDENCE CONCERNING THE ARBITRARINESS OF THE PLAN WHICH WAS INDEPENDENT OF THE COURT'S DICTA CONCERNING FEDERAL STATUTES GOVERNING FOREST SERVICE OPERATIONS.

The petitioner suggests that the Court of Appeals' "remarkable *holding*" (emphasis added) was that an *"agency's adherence to Acts of Congress constitutes judicially remediable bias."* Pet. at 14. (Emphasis in original). The petitioner ignores the actual holding of the Court below and, instead, asks this Court to review *dicta* in the majority opinion which is critical of several federal laws governing the Forest Service. This criticism was not a holding in the case and, in fact, was unrelated to the factual predicate for the decision. This Court has consistently indicated that it reviews judgments, not statements in opinions. *Black v. Cutter Laboratories*, 76 S. Ct. 824, 827 (1956); *California v. Rooney*, 483 U.S. 307, 311 (1987).

The decision below rested firmly on record evidence that the Forest Service acted arbitrarily and capriciously in establishing the timbering program in the Plan for the Wayne. This is highlighted by the fact that Judge Batchelder, in her concurring opinion, disassociated herself from the statutory criticisms in the majority opinion while unequivocally joining in the holding of the case:

> * * * I write separately because, while I, too, have serious questions and concerns about the management practices and policies of the Forest Service, I do not believe that the majority's largely undocumented broadside against the Forest Service is appropriate. The issue before us is simply whether the Plan was properly promulgated within the appropriate exercise of the agency's

> discretion and is therefore within the law. We conclude that it is not. Our speculation about the motives and biases of the Forest Service, even if accurate, is unnecessary, and therefore, ought not to be voiced in this opinion.

Pet. App. at 9a.

The majority opinion did not rest on general criticisms of the statutes governing the Forest Service. The opinion was fact bound and premised on the evidence in the record which demonstrated that the Forest Service arbitrarily applied the statutes and regulations governing forest plans. The heart of the decision is contained in the following portion of the opinion of the Court of Appeals:

> The Forest Service argues that its even-aged management plan is based on evidence that timbering will provide new opportunities for recreation that will, in turn, preserve and enhance the diversity of plant and animal communities in the Wayne National Forest. Most recreation does not require timber harvesting, however. Further, as the Forest Service's own records reflect, the Wayne is surrounded by and intermingled with privately-held land which already contains an abundance of diverse plant and animal life. Timbering simply does not promote the kind of recreational activities that are in demand in the Wayne; in fact, recreation like fishing and hiking is harmed by clearcutting. The planners also failed to recognize that cutting is unlikely to stimulate new and valuable forms of recreation because much of the Wayne has already been cut or developed. In

> that particular environment, clearcutting loses its value.

Pet. App. at 5a-6a.

A. The Evidence Ignored By Petitioner.

The observations of the Court below are amply supported in the record and also reflect the fact that the Forest Service was arbitrary and capricious even in applying its own regulations. The agency's regulations require that the Forest Service consider conditions on private and other publicly-owned land in designing a Forest Plan. 36 C.F.R. § 219.21 and 36 C.F.R. § 219.3 There were over 800,000 acres within the boundaries of the Forest purchasing unit as of 1982, when the original DEIS was begun for the Wayne. Only 21% of that area was actually owned by the Forest Service.

The record below was replete with evidence of the Forest Service's failure even to consider conditions on private and state-held lands surrounding and interspersed with the Wayne. The DEIS indicated that the 655,360 acres of privately-held land in the area of the Forest was not a mirror image, ecologically, of the Forest Service holdings. Almost 40% of the acreage on the private holdings is in open conditions such as cropland or pasture, often edging on areas of private or public land containing forest. JA at 573. This contrasts sharply to the Wayne Forest on which only 3% of the acreage was in open condition, while over 96% of the holdings in the Forest are dominated by hardwoods, pine or pine oak. JA at 574.

The recreational opportunities (including certain types of hunting) and wildlife value associated with early successional and edge conditions were abundantly met by private and State holdings. The record below is replete with reports concerning the overabundance of game animals associated with early successional and edge conditions in the region of the Wayne. The Forest Service's

records confirmed that the conditions on private holdings in the area had contributed to the overabundance of game and provided abundant recreational hunting activity. In fact, hunting quotas were raised because of the rapidly accelerated growth of deer and other game animals in the region.

The Wayne Plan proposed extensive timbering in the Wayne Forest for the purpose of promoting recreational hunting opportunities and related early successional forest conditions which were already in abundant supply on the private and State-held lands interspersed with and surrounding the Forest. What is and has been in short supply in the area of the Wayne and throughout Ohio are mature forest growth conditions permitting non-motorized recreational activities, such as hiking and remote camping. Planning documents which were part of the record below demonstrated that the greatest unmet demand in the Wayne was for these types of recreational uses. As noted by the Court of Appeals, most recreation, including fishing, off-road vehicle use, game hunting, camping, hiking, and horseback riding, does not require timber harvesting. Some, particularly fishing, hiking and other forms of dispersed recreation, are harmed by timber cutting.

The Wayne planners overestimated the benefits to recreation from timber because they failed to take price-quantity relationships into account. If the entire Wayne Forest were wilderness, then primitive recreation would have a relatively low value, and cutting one acre might stimulate new and valuable forms of recreation. But the reverse is true: much of the Wayne and surrounding lands had been cut over and developed. Thus, the value of recreation on timbered land is low compared to the value of lands protected from timbering and development.

Wayne planners were warned by their interdisciplinary team of experts that the local value of semi-primitive non-motorized recreation was much greater in the Wayne Forest than the value actually used for purposes of planning by the Forest Planners. JA at 694. The DEIS for the Wayne acknowledged that "people would

be willing to pay more [than the value used by planners] for recreation in SPNM setting because of the limited opportunity to do so in Southeastern Ohio."[5] *Id.* The DEIS and the alternatives were based on completely false premises: that money-losing timber sales can be ignored because of the alleged recreational value of timbering, even though the recreational value of areas not timbered is "much greater" and was undervalued in the planning process.

B. The Appropriateness Of Clearcutting Was Not A Determinative Factor.

Contrary to the suggestions in the petition, this case does not present an opportunity to address any conflict (apparent or real) between the Fifth and Sixth Circuits as to whether the NFMA bars clearcutting in the National Forest absent exceptional circumstances. As is apparent from the opinion below and the discussion above, the Court of Appeals rejected the Plan because of its overemphasis, to the detriment of other Forest uses, on even-age timber management in the Forest.

There are several types of even-aged silvicultural techniques, but the Plan's timbering plans would be just as arbitrary and unlawful if any of the methods were prescribed by the Plan. Even if the timbering had been done by the shelterwood technique, for example, instead of clearcutting, the suitable timber base still would have been excessive and the timbering would still reflect a total disregard for the conditions extant on the private and state-owned lands surrounding and interspersed with the Wayne. Similarly, regardless of the method of timbering, the range of alternatives was still inadequate as to the key planning issues, and the Forest Service still knowingly undervalued the demand for semi-primitive, non-motorized recreation.

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5. The petitioner suggests that because the Plan includes acreage assigned to primitive recreation, there was no "bias". Pet. at 17 n. 8. But the issue before the Court was the arbitrariness of failing even to consider conditions extant on surrounding lands in determining *how much timbering* should be undertaken. (Cont'd)

The court below did express the view that the Forest Service had also violated the NFMA by the excessive use of clearcutting in the Plan. Under the Plan, 80% of all timbering was to be by clearcutting. The Court concluded:

> The National Forest Management Act mandates that the Service ensure that even-aged management practices be used in the national forests only when "consistent with the protection of soil, watershed, fish, wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource." 16 U.S.C. § 1604(g)(3)(F)(v). The National Forest Management Act thus contemplates that even-aged management techniques will be used only in exceptional circumstances. Yet, the defendants would utilize even-aged management logging as if it were the statutory rule, rather than the exception. By arbitrarily undervaluing the recreational value of wilderness, the Forest Service created a very distorted picture of the Wayne National Forest. Based on false premises such as these, the Forest Service improperly concluded that clearcutting was necessary.

The NFMA does, in fact, contain specific requirements limiting the use of clearcutting in the National Forests which do not apply to any other silvicultural technique or timber management method.

(Cont'd)
Further, consideration of private and state-owned land would have resulted in designating more alternatives with emphasis on semi-primitive, non-motorized recreation. Similarly, petitioner contends that knowingly undervaluing semi-primitive, non-motorized recreation was "harmless error." *Id.* But petitioner is silent, as is the Plan, as to why the Forest Service ignored their own experts. The undervaluation obviously affects all the alternatives and caused the Forest Service to make decisions based on false assumptions.

Title 16, § 1604(g)(3)(F) requires that the Forest Service:

> Insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an even-aged stand of timber will be used as a cutting method on National Forest System lands only where —
>
> (I) For clearcutting, it is determined to be the optimum method, and for other such cuts, it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan;

Because of the language in NFMA and its legislative history, the petitioner's claimed conflict between the Fifth and Sixth Circuits — notably, the only two Courts of Appeals to have even discussed the issue — is more apparent than real.

As the Fifth Circuit noted in *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 200, 210 (5th Cir. 1978), a case relied upon below, the Congressional Committee responsible for NFMA "clearly recognized the significant impact of clearcutting in National Forests." The Court, quoting the Committee's report, noted:

> Clearcutting and other harvest systems aimed at creating even-aged stands result in sudden ecological change. The impacts on esthetics and other forest values are perceived as being more immediately significant than those with uneven-aged management. Therefore, the Committee believes that special consideration is needed to insure proper use of these systems.

Id. at 209.

Indeed, the Fifth Circuit in *Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994), like the Sixth Circuit, recognized that Congress had imposed limits on the use of clearcutting when it commented:

> Thus, NFMA does not bar even-aged management or require that it be undertaken only in exceptional circumstances; it requires that the Forest Service meet certain substantive restrictions before it selects even-aged management. *To be sure, these restrictions reflect a Congressional wariness toward even-aged management, constraining resort to its use.* This sluicing effect of the required inquiries might be described as making a decision to employ even-aged management more difficult.

Id. at 800 (emphasis added).

This case did not turn on the use of clearcutting as opposed to other timber management techniques. Nor is there a clear, developed conflict among the circuits concerning the exact limits on clearcutting under the NFMA. Only two Courts of Appeals have ever commented on the matter, and both have recognized that Congress disfavors clearcutting and that NFMA contains constraints on its use. This case simply determined that the Forest Service arbitrarily applied NFMA as to the Plan's proposals for even-aged management. The propriety of clearcutting was not determinative of the ruling of the court below.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — 36 CODE OF FEDERAL REGULATIONS, CHAPTER II

PART 217 — APPEAL OF REGIONAL GUIDES AND NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLANS

* * *

§ 217.1 Purpose and scope.

(a) This part provides a process by which a person or organization interested in the management of the National Forest System may administratively appeal decisions to approve, amend, or revise a National Forest land and resource management plan or approve or amend a regional guide prepared pursuant to 36 CFR part 219. This part establishes who may appeal such decisions, the kind of decisions that may be appealed, the responsibilities of the participants in an appeal, and the procedures that apply. This part provides a review of such decisions by an official at the next administrative level.

(b) This part complements, but does not replace, numerous opportunities to participate in and influence agency decisionmaking provided pursuant to the National Environmental Policy Act of 1969 (NEPA) and the associated implementing regulations and procedures in 40 CFR parts 1500-1508, 36 CFR parts 215, 216, and 219. Forest Service Manual Chapters 1920 and 1950, and Forest Service Handbooks 1909.12 and 1909.15.

* * *

§ 217.3 Decisions subject to appeal.

(a) The following decisions are subject to appeal under this part:

(1) Decisions to approve, amend, or revise a National Forest Land and Resource Management Plan including project or activity decisions for which environmental effects have been analyzed and disclosed within a final EIS and documented in a Record of Decision including approval, significant amendments, or revisions of a land and resource management plan.

* * *

§ 217.6 Participants.

(a) Other than Forest Service employees, any person or any non-Federal organization or entity may challenge a decision covered by this part and request a review by the Forest Service line officer at the next administrative level.

* * *

§ 217.7 Levels of appeal.

(a) *Decisions made by the Chief.* If the Chief of the Forest Service is the Deciding Officer, the notice of appeal is filed with the Secretary of Agriculture. Review by the Secretary is wholly discretionary. Within 15 days of receipt of a notice of appeal, the Secretary shall determine whether or not to review the decision in question. If the Secretary has not decided to review the Chief's decision by the expiration of the 15-day period, the requester(s) shall be notified by the Secretary's office

that the Chief's decision is the final administrative decision of the Department of Agriculture. When the Secretary elects to review an initial decision made by the Chief, the Secretary shall conduct the review in accordance with the first level appeal procedures outlined in this rule.

(b) *Decisions made by Forest Supervisors and Regional Foresters.* The levels of available review are as follows:

(1) If the decision is made by a Forest Supervisor, the notice of appeal is filed with the Regional Forester;

(2) If the decision is made by a Regional Forester, the notice of appeal is filed with the Chief of the Forest Service.

(c) *Discretionary review of dismissal decisions.* Dismissal decisions rendered by Forest Service line officers pursuant to this part (§ 217.11) are subject to discretionary review as follows:

(1) If the initial Reviewing Officer was the Regional Forester, the Chief has discretion to review.

(2) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

(d) *Discretionary review of appeal decisions.* Appeal decisions rendered by Regional Foresters and the Chief pursuant to this part are subject to discretionary review as follows:

(1) If the Reviewing Officer was the Regional Forester, the Chief has discretion to review.

(2) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

* * *

§ 217.15 Appeal record.

(a) Upon receipt of a copy of the notice of appeal, the Deciding Officer shall assemble the relevant decision documentation (§ 217.2) and pertinent records, and transmit them to the Reviewing Officer within 30 days in appeal of non-significant amendments to land and resource management plans or within 60 days for appeals of land and resource management plan approvals, significant amendments, or revisions, and for other programmatic decisions. The time period for forwarding the decision documentation is not extendable.

(b) In transmitting the decision documentation to the Reviewing Officer, the Deciding Officer shall indicate where the documentation addresses the issues raised in the notice of appeal. The Deciding Officer shall provide a copy of the transmittal letter to the appellant(s) and intervenor(s).

(c) The review of decisions appealed under this part focuses on the documentation developed by the Deciding Officer in reaching decisions. The records on which the Reviewing Officer shall conduct the review consists of the notice of appeal, any written comments submitted by intervenors, the official documentation prepared by the Deciding Officer in the decisionmaking process, the Deciding Officer's letter transmitting those documents to the Reviewing Officer, and any appeal related correspondence, including additional information requested by the Reviewing Officer pursuant to § 217.13 of this part.

(d) It is the responsibility of the Reviewing Officer to

maintain in one location a file of documents related to the decision and appeal.

(e) *Closing the record.* (1) In appeals with intervenors, the appeal record shall close upon receipt of comments on the appeal by the intervenor, but not later than the end of the 30-day period provided for intervenors to submit comments (§ 217.14(c)).

(2) In appeals without intervenors, the appeal record shall close upon receipt of the decision documentation from the Deciding Officer, unless time has been extended as provided for in §§ 217.12 and 217.13.

(f) The appeal record is open to public inspection at any time during the review.

(g) In appeals involving initial decisions of the Chief (217.7(a)), the establishment of an administrative record as defined in paragraph (a) of this section shall not begin unless the Secretary elects to review the appeal. Except for the initial notice of appeal, any filings made previous to the Secretary's election to review will not be accepted.

* * *

§ 217.16 Decision.

(a) The Reviewing Officer shall not issue a decision prior to the record closing (§ 217.15(e)).

(b) The Reviewing Officer's decision shall, in whole or in part, affirm or reverse the original decision. The Reviewing Officer's decision may include instructions for further action by the Deciding Officer.

(c) An appeal decision must be consistent with applicable law, regulations, and orders.

(d) The Reviewing Officer shall send a copy of the decision to all participants and to others upon request.

(e) Unless a higher level officer exercises the discretion to review a Receiving Officer's decision as provided at § 217.7(d), the Reviewing Officer's decision is the final administrative decision of the Department of Agriculture and the decision is not subject to further review under this part.

* * *

PART 219 — PLANNING

* * *

Subpart A — National Forest System Land and Resource Management Planning

* * *

§ 219.1 Purpose and principles.

(a) The regulations in this subpart set forth a process for developing, adopting, and revising land and resource management plans for the National Forest System as required by the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended (hereafter, *RPA*). These regulations prescribe how land and resource management planning is to be conducted on National Forest System lands. The resulting plans shall provide for multiple use and sustained yield of goods and

services from the National Forest System in a way that maximizes long term net public benefits in an environmentally sound manner.

(b) Plans guide all natural resource management activities and establish management standards and guidelines for the National Forest System. They determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management. Regional and forest planning will be based on the following principles:

* * *

§ 219.6 Public participation.

(a) Because the land and resource management planning process determines how the lands of the National Forest System are to be managed, the public is encouraged to participate throughout the planning process. The intent of public participation is to —

(1) Broaden the information base upon which land and resource management planning decisions are made;

(2) Ensure that the Forest Service understands the needs, concerns, and values of the public;

(3) Inform the public of Forest Service land and resource planning activities; and

(4) Provide the public with an understanding of Forest Service programs and proposed actions.

(b) Public participation in the preparation of environmental impact statements for planning begins with the publication of a notice of intent in the Federal Register. Public involvement in the preparation of draft and final environmental impact statements shall conform to the requirements of the National Environmental Policy Act and associated implementing regulations and Forest Service Manual and Handbook guidance (hereafter, "NEPA procedures"). Public comments shall be analyzed according to NEPA procedures.

(c) Public participation activities, as deemed appropriate by the responsible line officer, shall be used early and often throughout the development of plans. Formal public participation activities will begin with a notice to the news media and other sources which includes, as appropriate, the following information:

(1) A description of the proposed planning action;

(2) A description and map of the geographic area affected;

(3) The issues expected to be discussed;

(4) The kind, extent, and method(s) of public participation to be used;

(5) The times, dates, and locations scheduled or anticipated, for public meetings;

(6) The name, title, address, and telephone number of the Forest Service official who may be contacted for further information; and

(7) The location and availability of documents relevant to planning process.

(d) Public participation activities should be appropriate to the area and people involved. Means of notification should be appropriate to the level of planning. Public participation activities may include, but are not limited to, requests for written comments, meetings, conferences, seminars, workshops, tours, and similar events designed to foster public review and comment. The Forest Service shall state the objectives of each participation activity to assure that the public understands what type of information is needed and how this information relates to the planning process.

(e) Public comments shall be considered individually and by type of group and organization to determine common areas of concern and geographic distribution. The result of this analysis should be evaluated to determine the variety and intensity of viewpoints about ongoing and proposed planning and management standards and guidelines.

(f) All scheduled public participation activities shall be documented by a summary of the principal issues discussed, comments made, and a register of participants.

(g) At least 30 days' public notice shall be given for public participation activities associated with the development of regional guides and forest plans. Any notice requesting written comments on regional planning shall allow at least 60 calendar days for response. A similar request on forest planning shall allow at least 30 calendar days for response. Draft regional guides and forest plans and environmental impact statements shall be available for public comment for a least 3 months. See also §§ 219.8(c) and 219.10(b).

(h) The responsible line officer shall attend, or provide for adequate representation at, public participation activities.

(i) Copies of approved guides and plans shall be available for public review as follows:

(1) The RPA Assessment and the RPA Program shall be available at national headquarters, The Northeastern Area State and Private Forestry Office, and all Regional offices, Research Stations, Forest Supervisors' offices, and District Rangers' offices;

(2) The regional guides shall be available at national headquarters, the issuing regional office and regional offices of contiguous regions, each Forest Supervisor's office of forests within and contiguous to the issuing region, and each District Ranger's office in the region;

(3) The forest plan shall be available at the regional office for the forest, the Forest Supervisor's office, Forest Supervisors' offices contiguous to the forest, District Rangers' offices within the forest, and at least one additional location, to be determined by the Forest Supervisor, which shall offer convenient access to the public.

These documents may be made available at other locations convenient to the public.

(j) Documents considered in the development of plans shall be available at the office where the plans were developed.

(k) Forest planning activities should be coordinated to the extent practicable with owners of lands that are intermingled

with, or dependent for access upon, National Forest System lands. The results of this coordination shall be included in the environmental impact statement for the plan as part of the review required in § 219.7(c). The responsible line officer may individually notify these owners of forest planning activities where it is determined that notice provided for the general public is not likely to reach the affected landowners.

(l) Fees for reproducing requested documents shall be charged according to the Secretary of Agriculture's Fee Schedule (7 CFR part 1, subpart A, appendix A).

§ 219.7 Coordination with other public planning efforts.

(a) The responsible line officer shall coordinate regional and forest planning with the equivalent and related planning efforts of other Federal agencies, State and local governments, and Indian tribes.

(b) The responsible line officer shall give notice of the preparation of a land and resource management plan, along with a general schedule of anticipated planning actions, to the official or agency so designated by the affected State (including the Commonwealth of Puerto Rico). The same notice shall be mailed to all Tribal or Alaska Native leaders whose tribal lands or treaty rights are expected to be impacted and to the heads of units of government for the counties involved. These notices shall be issued simultaneously with the publication of the notice of intent to prepare an environmental impact statement required by NEPA procedures (40 CFR 1501.7).

(c) The responsible line officer shall review the planning and land use policies of other Federal agencies, State and local

governments, and Indian tribes. The results of this review shall be displayed in the environmental impact statement for the plan (40 CFR 1502.16(c), 1506.2). The review shall include —

(1) Consideration of the objectives of other Federal, State and local governments, and Indians tribes, as expressed in their plans and policies;

(2) An assessment of the interrelated impacts of these plans and policies;

(3) A determination of how each Forest Service plan should deal with the impacts identified; and,

(4) Where conflicts with Forest Service planning are identified, consideration of alternatives for their resolution.

(d) In developing land and resource management plans, the responsible line officer shall meet with the designated State official (or designee) and representatives of other Federal agencies, local governments, and Indian tribal governments at the beginning of the planning process to develop procedures for coordination. As a minimum, such conferences shall also be held after public issues and management concerns have been identified and prior to recommending the preferred alternative. Such conferences may be held in conjunction with other public participation activities, if the opportunity for government officials to participate in the planning process is not thereby reduced.

(e) In developing the forest plan, the responsible line officer shall seek input from other Federal, State and local governments, and universities to help resolve management concerns in the

planning process and to identify areas where additional research is needed. This input should be included in the discussion of the research needs of the designated forest planning area.

(f) A program of monitoring and evaluation shall be conducted that includes consideration of the effects of National Forest management on land, resources, and communities adjacent to or near the National Forest being planned and the effects upon National Forest management of activities on nearby lands managed by other Federal or other government agencies or under the jurisdiction of local governments.

* * *

§ 219.10 Forest planning — general procedure.

(a) *Responsibilities* — (1) *Regional Forester.* The Regional Forester shall establish regional policy for forest planning and approve all forest plans in the region.

(2) *Forest Supervisor.* The Forest Supervisor has overall responsibility for the preparation and implementation of the forest plan and preparation of the environmental impact statement for the forest plan. The Forest Supervisor appoints and supervises the interdisciplinary team.

(3) *Interdisciplinary team.* The team, under the direction of the Forest Supervisor, implements the public participation and coordination activities required by § 219.6 and § 219.7. The team shall continue to function even though membership may change and shall monitor and evaluate planning results and recommend revisions and amendments. The interdisciplinary team shall develop a forest plan and environmental impact

statement using the process established in § 219.12 and paragraph (b) below.

(b) *Public review of plain and environmental impact statement.* A draft and final environmental impact statement shall be prepared for the proposed plan according to NEPA procedures. The draft environmental impact statement shall identify a preferred alternative. To comply with 16 U.S.C. 1604(d), the draft environmental impact statement and proposed plan shall be available for public comment for at least 3 months, at convenient locations in the vicinity of the lands covered by the plan, beginning on the date of the publication of the notice of availability in the Federal Register. During this period, and in accordance with the provisions in § 219.6, the Forest Supervisor shall publicize and hold public participation activities as deemed necessary to obtain adequate public input.

(c) *Plan approval.* The Regional Forester shall review the proposed plan and the final environmental impact statement and either approve or disapprove the plan.

(1) *Approval.* The Regional Forester shall prepare a concise public record of decision which documents approval and accompanies the plan and final environmental impact statement. The record of decision shall be prepared according to NEPA procedures (40 CFR 1505.2). The approved plan shall not become effective until at least 30 days after publication of the notice of availability of the final environmental impact statement in the Federal Register, to comply with 16 U.S.C. 1604(d) and 1604(j).

(2) *Disapproval.* The Regional Forester shall return the plan and final environmental impact statement to the Forest

Supervisor with a written statement of the reasons for disapproval. The Regional Forester may also specify a course of action to be undertaken by the Forest Supervisor in order to remedy deficiencies, error, or omissions in the plan or environmental impact statement.

(d) *Public appeal of approval decision.* The provisions of 36 CFR part 211, subpart B apply to any administrative appeal of the Regional Forester's decision to approve a forest plan. Decisions to disapprove a plan and other decisions made during the forest planning process prior to the issuance of a record of decision approving the plan are not subject to administrative appeal.

(e) *Plan implementation.* As soon as practicable after approval of the plan, the Forest Supervisor shall ensure that, subject to valid existing rights, all outstanding and future permits, contracts cooperative agreements, and other instruments for occupancy and use of affected lands are consistent with the plan. Subsequent administrative activities affecting such lands, including budget proposals, shall be based on the plan. The Forest Supervisor may change proposed implementation schedules to reflect differences between proposed annual budgets and appropriated funds. Such scheduled changes shall be considered an amendment to the forest plan, but shall not be considered a significant amendment, or require the preparation of an environmental impact statement, unless the changes significantly alter the long-term relationship between levels of multiple-use goods and services projected under planned budget proposals as compared to those projected under actual appropriations.

(f) *Amendment.* The Forest Supervisor may amend the

forest plan. Based on an analysis of the objectives, guidelines, and other contents of the forest plan, the Forest Supervisor shall determine whether a proposed amendment would result in a significant change in the plan. If the change resulting from the proposed amendment is determined to be significant, the Forest Supervisor shall follow the same procedure as that required for development and approval of a forest plan. If the change resulting from the amendment is determined not to be significant for the purposes of the planning process, the Forest Supervisor may implement the amendment following appropriate public notification and satisfactory completion of NEPA procedures.

(g) *Revision.* A forest plan shall ordinarily be revised on a 10-year cycle or at least every 15 years. It also may be revised whenever the Forest Supervisor determines that conditions or demands in the area covered by the plan have changed significantly or when changes in RPA policies, goals, or objectives would have a significant effect on forest level programs. In the monitoring and evaluation process, the interdisciplinary team may recommend a revision of the forest plan at any time. Revisions are not effective until considered and approved in accordance with the requirements for the development and approval of a forest plan. The Forest Supervisor shall review the conditions on the land covered by the plan at least every 5 years to determine whether conditions or demands of the public have change significantly.

(h) *Planning records.* The Forest Supervisor and interdisciplinary team shall develop and maintain planning records that document the decisions and activities that result from the process of developing a forest plan. Records that support analytical conclusions made and alternatives considered by the team and approved by the Forest Supervisor throughout

the planning process shall be maintained. Such supporting records provide the basis for the development of the forest plan and associated documents required by NEPA procedures.

§ 219.11 Forest plan content.

The forest plan shall contain the following:

(a) A brief summary of the analysis of the management situation, including demand and supply conditions for resource commodities and services, production potentials, and use and development opportunities;

(b) Forest multiple-use goals and objectives that include a description of the desired future condition of the forest or grassland and an identification of the quantities of goods and services that are expected to be produced or provided during the RPA planning periods;

(c) Multiple-use prescriptions and associated standards and guidelines for each management area including proposed and probable management practices such as the planned timber sale program; and

(d) Monitoring and evaluation requirements that will provide a basis for a periodic determination and evaluation of the effects of management practices.

§ 219.12 Forest planning — process.

(a) *General requirements.* The preparation, revision, or significant amendment of a forest plan shall comply with the requirements established in this section. The planning process

includes at least those actions set forth in paragraphs (b) through (k) of the section. Some actions may occur simultaneously, and it may be necessary to repeat an action as additional information becomes available. The environmental impact statement for each forest plan shall be prepared according to NEPA procedures. To the extent feasible, a single process shall be used to meet planning and NEPA requirements.

(b) *Identification of purpose and need.* The interdisciplinary team shall identify and evaluate public issues, management concerns, and resource use and development opportunities, including those identified throughout the planning process during public participation activities and coordination with other Federal agencies, State and local governments, and Indian tribes. The Forest Supervisor shall determine the major public issues, management concerns, and resource use and development opportunities to be addressed in the planning process.

(c) *Planning criteria.* Criteria shall be prepared to guide the planning process. Criteria apply to collection and use of inventory data and information, analysis of the management situation, and the design, formulation, and evaluation of alternatives. Criteria designed to achieve the objective of maximizing net public benefits shall be included. Specific criteria may be derived from —

(1) Laws, Executive Orders, regulations, and agency policy as set forth in the Forest Service Manual;

(2) Goals and objectives in the RPA Program and regional guides;

(3) Recommendations and assumptions developed from public issues, management concerns, and resource use and development opportunities;

(4) The plans and programs of other Federal agencies, State and local governments, and Indian tribes;

(5) Ecological, technical, and economic factors; and

(6) The resource integration and management requirements in §§ 219.13 through 219.27.

(d) *Inventory data and information collection.* Each Forest Supervisor shall obtain and keep current inventory data appropriate for planning and managing the resources under his or her administrative jurisdiction. The Supervisor will assure that the interdisciplinary team has access to the best available data. This may require that special inventories or studies be prepared. The interdisciplinary team shall collect, assemble, and use data, maps, graphic material, and explanatory aids, of a kind, character, and quality, and to the detail appropriate for the management decisions to be made. Data and information needs may vary as planning problems develop from identification of public issues, management concerns, and resource use and development opportunities. Data shall be stored for ready retrieval and comparison and periodically shall be evaluated for accuracy and effectiveness. The interdisciplinary team will use common data definitions and standards established by the Chief of the Forest Service to assure uniformity of information between all planning levels. As information is recorded, it shall be applied in any subsequent planning process. Information developed according to common data definitions and standards shall be used in the preparation of the 1990, and subsequent RPA Assessments and RPA Programs.

(e) *Analysis of the management situation.* The analysis of the management situation is a determination of the ability of the planning area covered by the forest plan to supply goods and services in response to society's demands. The primary purpose of this analysis is to provide a basis for formulating a broad range of reasonable alternatives. The analysis may examine the capability of the unit to supply outputs both with and without legal and other requirements. As a minimum, the analysis of the management situation shall include the following:

(1) Benchmark analyses to define the range within which alternatives can be constructed. Budgets shall not be a constraint. The following benchmark analyses shall be consistent with the minimum applicable management requirements of § 219.27 and shall define at least —

(i) The minimum level of management which would be needed to maintain and protect the unit as part of the National Forest System together with associated costs and benefits;

(ii) The maximum physical and biological production potentials of significant individual goods and services together with associated costs and benefits;

(iii) Monetary benchmarks which estimate the maximum present net value of those resources having an established market value or an assigned value;

(A) For forest planning areas with major resource outputs that have an established market price, monetary benchmarks shall include an estimate of the mix of resource uses, combined with a schedule of outputs and costs, which will maximize the present net value of those major outputs that have an established market price;

(B) For all forest planning areas, monetary benchmarks shall include an estimate of the mix of resource uses, combined with a schedule of outputs and costs, which will maximize the present net value of those major outputs that have an established market price or are assigned a monetary value;

(C) For forest planning areas with a significant timber resource, estimates for paragraphs (e)(1)(iii) (A) and (B) of this section shall be developed both with and without meeting the requirements for compliance with a base sale schedule of timber harvest, all described in § 219.16(a)(1), and with and without scheduling the harvest of even-aged stands generally at or beyond culmination of mean annual increment of growth, as described in § 219.16(a)(2)(iii).

(D) Estimates for paragraphs (e)(1)(iii) (A) and (B) of this section shall be developed both with and without other constraints when needed to address major public issues, management concerns, or resource opportunities identified during the planning process.

(2) The current level of goods and services provided by the unit and the most likely amount of goods and services expected to be provided in the future if current management direction continues; this will be the same analysis as that required by § 219.12(f)(5).

(3) Projections of demand using best available techniques with both price and nonprice information. To the extent practical, demand will be assessed as price-quantity relationships.

(4) A determination of the potential to resolve public issues and management concerns.

(5) Based on consideration of data and findings developed in paragraphs (e)(1)–(4), a determination of the need to establish or change management direction.

(f) *Formulation of alternatives.* The interdisciplinary team shall formulate a broad range of reasonable alternatives according to NEPA procedures. The primary goal in formulating alternatives, besides complying with NEPA procedures is to provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits, consistent with the resource integration and management requirements of §§ 219.13 through 219.27.

(1) Alternatives shall be distributed between the minimum resource potential and the maximum resource potential to reflect to the extent practicable the full range of major commodity and environmental resource uses and values that could be produced from the forest. Alternatives shall reflect a range of resource outputs and expenditure levels.

(2) Alternatives shall be formulated to facilitate analysis of opportunity costs and of resource use and environmental trade-offs among alternatives and between benchmarks and alternatives.

(3) Alternatives shall be formulated to facilitate evaluation of the effects on present net value, benefits, and costs of achieving various outputs and values that are not assigned monetary values, but that are provided at specified levels.

(4) Alternatives shall provide different ways to address and respond to the major public issues, management concerns, and resource opportunities identified during the planning process.

(5) Reasonable alternatives which may require a change in existing law or policy to implement shall be formulated if necessary to address a major public issue, management concern, or resource opportunity identified during the planning process (40 CFR 1501.7, 1502.14(c).

(6) At least one alternative shall be developed which responds to and incorporates the RPA Program tentative resource objectives for each forest displayed in the regional guide.

(7) At least one alternative shall reflect the current level of goods and services provided by the unit and the most likely amount of goods and services expected to be provided in the future if current management direction continues. Pursuant to NEPA procedures, this alternative shall be deemed the "no action" alternative.

(8) Each alternative shall represent to the extent practicable the most cost efficient combination of management prescriptions examined that can meet the objectives established in the alternative.

(9) Each alternative shall state at least —

(i) The condition and uses that will result from long-term application of the alternative;

(ii) The goods and services to be produced, the timing and flow of these resource outputs together with associated costs and benefits;

(iii) Resource management standards and guidelines; and

(iv) The purposes of the management direction proposed.

(g) *Estimated effects of alternatives.* The physical, biological, economic, and social effects of implementing each alternative considered in detail shall be estimated and compared according to NEPA procedures. These effects include those described in NEPA procedures (40 CFR 1502.14 and 1502.16) and at least the following:

(1) The expected outputs for the planning periods, including appropriate marketable goods and services, as well as nonmarket items, such as recreation and wilderness use, wildlife and fish, protection and enhancement of soil, water, and air, and preservation of aesthetic and cultural resource values;

(2) The relationship of expected outputs to the RPA Program tentative resource objectives for the forest displayed in the current regional guide;

(3) Direct and indirect benefits and costs, analyzed in sufficient detail to estimate —

(i) the expected real-dollar costs (discounted when appropriate), including investment, administrative, and operating costs of the agency and all other public and private costs required to manage the forest up to the point where the outputs are valued and the environmental consequences are realized;

(ii) the expected real-dollar value (discounted when appropriate) of all outputs attributable to each alternative to the extent that monetary values can be assigned to nonmarket goods and services, using quantitative and qualitative criteria when monetary values may not reasonably be assigned;

(iii) the economic effects of alternatives, including impacts on present net value, total receipts to the Federal Government, direct benefits to users that are not measured in receipts to the Federal Government, receipt shares to State and local governments, income, and employment in affected areas; and

(iv) the monetary opportunity costs (changes in present net value) associated with those management standards and resource outputs in each alternative that were not assigned monetary values but were provided at specified levels, compared with the maximum present net value benchmarks developed in § 219.12(e)(1)(iii).

(4) The significant resource tradeoffs and opportunity costs associated with achieving alternative resource objectives.

(h) *Evaluation of alternatives:* Using planning criteria, the interdisciplinary team shall evaluate the significant physical, biological, economic, and social effects of each management alternative that is considered in detail. The evaluation shall include a comparative analysis of the aggregate effects of the management alternatives and shall compare present net value, social and economic impacts, outputs of goods and services, and overall protection and enhancement of environmental resources.

(i) *Preferred alternative recommendation.* The Forest Supervisor shall review the interdisciplinary team's evaluation and shall recommend to the Regional Forester a preferred alternative to be identified in the draft environmental impact statement and displayed as the proposed plan.

(j) *Plan approval.* The Regional Forester shall review the

proposed plan and final environmental impact statement and either approve or disapprove the plan in accordance with § 219.10(c). The record of decision for approval of a plan shall include, in addition to the requirements of NEPA procedures (40 CFR 1505.2), a summarized comparison of the selected alternative with:

(1) Any other alternative considered which is environmentally preferable to the selected alternative; and

(2) Any other alternative considered which comes nearer to maximizing present net value.

(k) *Monitoring and evaluation.* At intervals established in the plan, implementation shall be evaluated on a sample basis to determine how well objectives have been met and how closely management standards and guidelines have been applied. Based upon this evaluation, the interdisciplinary team shall recommend to the Forest Supervisor such changes in management direction, revisions, or amendments to the forest plan as are deemed necessary. Monitoring requirements identified in the forest plan shall provide for —

(1) A quantitative estimate of performance comparing outputs and services with those projected by the forest plan;

(2) Documentation of the measured prescriptions and effects, including significant changes in productivity of the land; and

(3) Documentation of costs associated with carrying out the planned management prescriptions as compared with costs estimated in the forest plan.

(4) A description of the following monitoring activities:

(i) The actions, effects, or resources to be measured, and the frequency of measurements;

(ii) Expected precision and reliability of the monitoring process; and

(iii) The time when evaluation will be reported.

(5) A determination of compliance with the following standards:

(i) Lands are adequately restocked as specified in the forest plan;

(ii) Lands identified as not suited for timber production are examined at least every 10 years to determine if they have become suited; and that, if determined suited, such lands are returned to timber production;

(iii) Maximum size limits for harvest areas are evaluated to determine whether such size limits should be continued; and

(iv) Destructive insects and disease organisms do not increase to potentially damaging levels following management activities.

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§ 219.14 Timber resource land suitability.

During the forest planning process, lands which are not suited for timber production shall be identified in accordance with the criteria in paragraphs (a) through (d) of this section.

(a) During the analysis of the management situation, data on all National Forest System lands within the planning area shall be reviewed, and those lands within any one of the categories described in paragraphs (a) (1) through (4) of this section shall be identified as not suited for timber production —

(1) The land is not forest land an defined in § 219.3.

(2) Technology is not available to ensure timber production from the land without irreversible resource damage to soils productivity, or watershed conditions.

(3) There is not reasonable assurance that such lands can be adequately restocked as provided in § 219.27(c)(3).

(4) The land has been withdrawn from timber production by an Act of Congress, the Secretary of Agriculture or the Chief of the Forest Service.

(b) Forest lands other than those that have been identified as not suited for timber production in paragraph (a) of this section shall be further reviewed and assessed prior to formulation of alternatives to determine the costs and benefits for a range of management intensities for timber production. For the purpose of analysis, the planning area shall be stratified into categories of land with similar management costs and

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returns. The stratification should consider appropriate factors that influence the costs and returns such as physical and biological conditions of the site and transportation requirements. This analysis shall identify the management intensity for timber production for each category of land which results in the largest excess of discounted benefits less discounted costs and shall compare the direct costs of growing and harvesting trees, including capital expenditures required for timber production, to the anticipated receipts to the government, in accordance with § 219.12 and paragraphs (b)(1) through (b)(3) of this section.

(1) Direct benefits are expressed as expected gross receipts to the government. Such receipts shall be based upon expected stumpage prices and payments-in-kind from timber harvest considering future supply and demand situation for timber and upon timber production goals of the regional guide.

(2) Direct costs include the anticipated investments, maintenance, operating, management, and planning costs attributable to timber production activities, including mitigation measures necessitated by the impacts of timber production.

(3) In addition to long-term yield, the financial analysis must consider costs and returns of managing the existing timber inventory.

(c) During formulation and evaluation of each alternative as required in § 1219.12 (f) and (g), combinations of resource management objectives for the various multiple uses including outdoor recreation, timber, watershed, range wildlife and fish, and wilderness. The formulation and evaluation of each alternative shall consider the costs and benefits of alternative management intensities for timber production as identified

pursuant to paragraph (b) of this section in accordance with § 219.12(f). Lands shall be tentatively identified as not appropriate for timber production to meet objectives of the alternative being considered if —

(1) Based upon a consideration of multiple-use objectives for the alternative, the land is proposed for resource uses that preclude timber production, such as wilderness;

(2) Other management objectives for the alternative limit timber production activities to the point where management requirements set forth in § 219.27 cannot be met; or

(3) The lands are not cost-efficient, over the planning horizon, in meeting forest objectives, which include timber production.

(d) Lands identified as not suited for timber production in paragraph (a) of this section and lands tentatively identified as not appropriate for timber production in paragraph (c) of this section shall be designated as not suited for timber production in the preferred alternative. Designation in the plan of lands not suited for timber production shall be reviewed at least every 10 years. Such lands may be reviewed and redesignated as suited for timber production due to changed conditions at any time, according to the criteria in paragraphs (a) and (c) of this section, and according to the procedures for amendment or revision of the forest plan in § 219.10 (f) and (g).

§ 219.15 Vegetation management practices.

When vegetation is altered by management, the methods, timing, and intensity of the practices determine the level of

benefits that can be obtained from the affected resources. The vegetation management practices chosen for each vegetation type and circumstance shall be defined in the forest plan with applicable standards and guidelines and the reasons for the choices. Where more than one vegetation management practice will be used in a vegetation type, the conditions under which each will be used shall be based upon thorough reviews of technical and scientific literature and practical experience, with appropriate evaluation of this knowledge for relevance to the specific vegetation and site conditions. On National Forest System land, the vegetation management practice chosen shall comply with the management requirements in § 219.27(b).

§ 219.16 Timber resource sale schedule.

In a forest plan, the selected forest management alternative includes a sale schedule which provides the allowable sale quantity. The sale schedule of each alternative, including those which depart from base sale schedules, shall be formulated in compliance with 1219.12(f) and paragraphs (a) and (b) of this section.

(a) Alternatives shall be formulated that include determinations of the quantity of the timber that may be sold during each decade. These quantity determinations shall be based on the principle of sustained yield and shall meet the management requirements in § 219.27. For each alternative, the determination shall include a calculation of the long-term sustained-yield capacity and the base sale schedule and, when appropriate, a calculation of timber sale alternatives that may depart from the base sale schedule as provided in paragraphs (a)(1) through (a)(3) of this section.

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(1) For the base sale schedules, the planned sale for any future decade shall be equal to, or greater than, the planned sale for the preceding decade, provided that the planned sale is not greater than the long-term sustained-yield capacity consistent with the management objectives of the alternative.

(2) The determinations of the appropriate long-term sustained-yield capacities, base sale schedules, and departure alternatives to the base sale schedules shall be made on the basis of the guidelines which follow:

(i) For the long-term sustained-yield capacities and the base sale schedules, assume intensities of management and degree of timber utilization consistent with the goals, assumptions, and requirements contained in, or used in, the preparation of the current RPA Program and regional guide. For the base sale schedule, the management and utilization assumptions shall reflect the projected changes in practices for the four decades contained in, or used in, the preparation of the current RPA Program and regional guide. Beyond the fourth decade, the assumptions shall reflect those projected for the fourth decade of the current RPA Program, unless there is a basis for a different assumption;

(ii) For alternatives with sale schedules which depart from the corresponding base sale schedule, assume an appropriate management intensity;

(iii) In accordance with the established standards, assure that all even-aged stands scheduled to be harvested during the planning period will generally have reached the culmination of mean annual increment shall be based on expected growth, according to management intensities and utilization standards

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assumed in paragraphs (a)(2) (i) and (ii) of this section and on forest type and site quality. Mean annual increment shall be expressed in cubic measure. Alternatives which incorporate exceptions to these standards shall be evaluated if it is reasonable to expect that overall multiple use objectives would be better attained. Alternatives which incorporate exceptions to these standards are permitted for the use of sound silvicultural practices, such as thinning or other stand improvement measures; for salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow, or other catastrophe, or which are in imminent danger from insect or disease attack; for cutting for experimental and research purposes; or for removing particular species of trees, after consideration has been given to the multiple uses of the area being planned and after completion of the public participation process applicable to the preparation of a forest plan; and

(iv) Each sale schedule shall provide for a forest structure that will enable perpetual timber harvest which meets the principle of sustained-yield and multiple-use objectives of the alternative.

(3) Alternatives with sale schedules which depart from the principles of paragraph (a)(1) of this section and which will lead to better attaining the overall objectives of multiple-use management shall be evaluated when any of the following conditions are indicated:

(i) None of the other alternatives considered provides a sale schedule that achieves the assigned goals of the RPA Program as provided in § 219.4(b);

(ii) High mortality losses from any cause can be

significantly reduced or prevented or forest age-class distribution can be improved, thereby facilitating future sustained-yield management; or

(iii) Implementation of the corresponding base sale schedule would cause a substantial adverse impact upon a community in the economic area in which the forest is located.

(iv) It is reasonable to expect that overall multiple-use objectives would otherwise be better attained.

(b) The sale schedule of the management alternative selected in accordance with § 219.12 provides the allowable sale quantity for the first plan period.

§ 219.17 Evaluation of roadless areas.

(a) Unless otherwise provided by law, roadless areas within the National Forest System shall be evaluated and considered for recommendation as potential wilderness areas during the forest planning process, as provided in paragraphs (a) (1) and (2) of this section.

(1) During analysis of the management situation, the following areas shall be subject to evaluation:

(i) Roadless areas including those previously inventoried in the second roadless area review and evaluation (RARE II), in a unit plan, or in a forest plan, which remain essentially roadless and undeveloped, and which have not yet been designated as wilderness or for nowilderness uses by law. In addition, other essentially roadless areas may be subject to evaluation at the discretion of the Forest Supervisor.

(ii) Areas contiguous to existing wilderness, primitive areas, or administratively proposed wildernesses, regardless of which agency has jurisdiction for the wilderness or proposed wilderness;

(iii) Areas that are contiguous to roadless and undeveloped areas in other Federal ownership that have identified wilderness potential; and

(iv) Areas designated by Congress for wilderness study, administrative proposals pending before Congress, and other legislative proposals pending which have been endorsed by the President.

(2) For each area subject to evaluation under paragraph (a)(1) of this section, the determination of the significant resource issues, which in turn affect the detail and scope of evaluation required by the Forest Service, shall be developed with public participation. As a minimum, the evaluation shall include consideration of:

(i) The values of the area as wilderness;

(ii) The values foregone and effects on management of adjacent lands as a consequence of wilderness designation;

(iii) Feasibility of management as wilderness, in respect to size, non-conforming use, land ownership patterns, and existing contractual agreements or statutory rights;

(iv) Proximity to other designated wilderness and relative contribution to the National Wilderness Preservation System; and

(v) The anticipated long-term changes in plant and animal species diversity, including the diversity of natural plant and animal communities of the forest planning area and the effects of such changes on the values for which wilderness areas were created.

* * *

§ 219.18 Wilderness management.

Forest planning shall provide direction for the management of designated wilderness and primitive areas in accordance with the provisions of 36 CFR part 293. In particular, plans shall —

(a) Provide for limiting and distributing visitor use of specific areas in accord with periodic estimates of the maximum levels of use that allow natural processes to operate freely and that do not impair the values for which wilderness areas were created; and

(b) Evaluate the extent to which wildfire, insect, and disease control measures may be desirable for protection of either the wilderness or adjacent areas and provide for such measures when appropriate.

§ 219.19 Fish and wildlife resource.

Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area.

In order to insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area.

(a) Each alternative shall establish objectives for the maintenance and improvement of habitat for management indicator species selected under paragraph (g)(1) of this section, to the degree consistent with overall multiple use objectives of the alternative. To meet this goal, management planning for the fish and wildlife resource shall meet the requirements set forth in paragraphs (a)(1) through (a)(7) of this section.

(1) In order to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and/or invertebrate species present in the area shall be identified and selected as management indicator species and the reasons for their selection will be stated. These species shall be selected because their population changes are believed to indicate the effects of management activities. In the selection of management indicator species, the following categories shall be represented where appropriate: Endangered and threatened plant and animal species identified on State and Federal lists for the planning area; species with special habitat needs that may be influenced significantly by planned management programs; species commonly hunted, fished, or trapped; non-game species of special interest; and additional plant or animal species selected because their population changes are believed to indicate the effects of management activities on other species of selected major biological communities or on water quality. On the basis of available scientific information, the interdisciplinary team shall estimate the effects of changes in vegetation type, timber

age classes, community composition, rotation age, and year-long suitability of habitat related to mobility of management indicator species. Where appropriate, measures to mitigate adverse effects shall be prescribed.

(2) Planning alternatives shall be stated and evaluated in terms of both amount and quality of habitat and of animal population trends of the management indicator species.

(3) Biologists from State fish and wildlife agencies and other Federal agencies shall be consulted in order to coordinate planning for fish and wildlife, including opportunities for the reintroduction of extirpated species.

(4) Access and dispersal problems of hunting, fishing, and other visitor uses shall be considered.

(5) The effects of pest and fire management on fish and wildlife populations shall be considered.

(6) Population trends of the management indicator species will be monitored and relationships to habitat changes determined. This monitoring will be done in cooperation with State fish and wildlife agencies, to the extent practicable.

(7) Habitat determined to be critical for threatened and endangered species shall be identified, and measures shall be prescribed to prevent the destruction or adverse modification of such habitat. Objectives shall be determined for threatened and endangered species that shall provide for, where possible, their removal from listing as threatened and endangered species through appropriate conservation measures, including the designation of special areas to meet the protection and management needs of such species.

§ 219.20 Grazing resource.

In forest planning, the suitability and potential capability of National Forest System lands for producing forage for grazing animals and for providing habitat for management indicator species shall be determined as provided in paragraphs (a) and (b) of this section. Lands so identified shall be managed in accordance with direction established in forest plans.

(a) Lands suitable for grazing and browsing shall be identified and their condition and trend shall be determined. The present and potential supply of forage for livestock, wild and free-roaming horses and burros, and the capability of these lands to produce suitable food and cover for selected wildlife species shall be estimated. The use of forage by grazing and browsing animals will be estimated. Lands in less than satisfactory condition shall be identified and appropriate action planned for their restoration.

(b) Alternative range management prescriptions shall consider grazing systems and the facilities necessary to implement them; land treatment and vegetation manipulation practices; and evaluation of pest problems; possible conflict or beneficial interactions among livestock, wild free-roaming horses and burros and wild animal populations, and methods of regulating these; direction for rehabilitation of ranges in unsatisfactory condition; and comparative cost efficiency of the prescriptions.

* * *

§ 219.24 Cultural and historic resources.

Forest planning shall provide for the identification, protection, interpretation, and management of significant cultural resources on National Forest System lands. Planning of the resource shall be governed by the requirements of Federal laws pertaining to historic preservation, and guided by paragraphs (a)(1) through (a)(3) of this section.

(a) Forest planning shall —

(1) Provide an overview of known data relevant to history, ethnography, and prehistory of the area under consideration, including known cultural resource sites;

(2) Identify areas requiring more intensive inventory;

(3) Provide for evaluation and identification of appropriate sites for the National Register of Historic Places;

(4) Provide for establishing measures for the protection of significant cultural resources from vandalism and other human depredation, and natural destruction;

(5) Identify the need for maintenance of historic sites on, or eligible for inclusion in, the National Register of Historic Places; and

(6) Identify opportunities for interpretation of cultural resources for the education and enjoyment of the American public.

(b) In the formulation and analysis of alternatives,

interactions among cultural resources and other multiple uses shall be examined. This examination shall consider impacts of the management of cultural resources on other uses and activities and impacts of other uses and activities on cultural resource management.

(c) Formulation and evaluation of alternatives shall be coordinated to the extent feasible with the State cultural resource plan and planning activities of the State Historic Preservation Office and State Archaeologist and with other State and Federal agencies.

§ 219.25 Research natural areas.

Forest planning shall provide for the establishment of Research Natural Areas (RNA's). Planning shall make provision for the identification of examples of important forest, shrubland, grassland, alpine, aquatic, and geologic types that have special or unique characteristics of scientific interest and importance and that are needed to complete the national network of RNA's. Biotic, aquatic, and geologic types needed for the network shall be identified using a list provided by the Chief of the Forest Service. Authority to establish RNA's is delegated to the Chief at 7 CFR 2.60(a) and 36 CFR 251.23. Recommendations for establishment of areas shall be made to the Chief through the planning process.

§ 219.27 Management requirements.

The minimum specific management requirements to be met in accomplishing goals and objectives for the National Forest System are set forth in this section. These requirements guide the development, analysis, approval, implementation, monitoring and evaluation of forest plans.

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(a) *Resource protection.* All management prescriptions shall —

(1) Conserve soil and water resources and not allow significant or preeminent impairment of the productivity of the land;

(2) Consistent with the relative resource values involved, minimize serious or long-lasting hazards from flood, wind, wildfire, erosion, or other natural physical forces unless these are specifically excepted, as in wilderness;

(3) Consistent with the relative resource values involved, prevent or reduce serious, long lasting hazards and damage from pest organisms, utilizing principles of integrated pest management. Under this approach all aspects of a pest-host system should be weighed to determine situation-specific prescriptions which may utilize a combination of techniques including, as appropriate, natural controls, harvesting, use of resistant species, maintenance of diversity, removal of damaged trees, and judicious use of pesticides. The basic principle in the choice of strategy is that, in the long term, it be ecologically acceptable and compatible with the forest ecosystem and the multiple use objectives of the plan;

(4) Protect streams, streambanks, shorelines, lakes, wetlands, and other bodies of water as provided under paragraphs (d) and (e) of this section;

(5) Provide for and maintain diversity of plant and animal communities to meet overall multiple-use objectives, as provided in paragraph (g) of this section;

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(6) Provide for adequate fish and wildlife habitat to maintain viable populations of existing native vertebrate species and provide that habitat for species chosen under §219.19 is maintained and improved to the degree consistent with multiple-use objectives established in the plan;

(7) Be assessed prior to project implementation for potential physical, biological, aesthetic, cultural, engineering, and economic impacts and for consistency with multiple uses planned for the general area;

(8) Include measures for preventing the destruction or adverse modification of critical habitat for threatened and endangered species;

(9) Provide that existing significant transportation and utility corridors and other significant right-of-ways that are capable and likely to be needed to accommodate the facility or use from an additional compatible right-of-way be designated as a right-of-way corridor. Subsequent right-of-way grants will, to the extent practicable, and as determined by the responsible line officer, use designated corridors;

(10) Ensure that any roads constructed through contracts, permits, or leases are designed according to standards appropriate to the planned uses, considering safety, cost of transportation, and effects upon lands and resources;

(11) Provide that all roads are planned and designed to re-establish vegetative cover on the disturbed area within a reasonable period of time, not to exceed 10 years after the termination of a contract, lease or permit, unless the road is determined necessary as a permanent addition to the National Forest Transportation System; and

(12) Be consistent with maintaining air quality at a level that is adequate for the protection and use of National Forest System resources and that meets or exceeds applicable Federal, State and/or local standards or regulations.

(b) *Vegetative manipulation.* Management prescriptions that involve vegetative manipulation of tree cover for any purpose shall —

(1) Be best suited to the multiple-use goals established for the area with potential environmental, biological, cultural resource, aesthetic, engineering, and economic impacts, as stated in the regional guides and forest plans, being considered in this determination;

(2) Assure that lands can be adequately restocked as provided in paragraph (c)(3) of this section, except where permanent openings are created for wildlife habitat improvement, vistas, recreation uses and similar practices;

(3) Not be chosen primarily because they will give the greatest dollar return or the greatest output of timber, although these factors shall be considered;

(4) Be chosen after considering potential effects on residual trees and adjacent stands;

(5) Avoid permanent impairment of site productivity and ensure conservation of soil and water resources;

(6) Provide the desired effects on water quantity and quality, wildlife and fish habitat, regeneration of desired tree species, forage production, recreation uses, aesthetic values, and other resource yields; and

(7) Be practical in terms of transportation and harvesting requirements, and total costs of preparation, logging, and administration.

(c) *Silvicultural practices.* The following management requirements apply to timber harvest and cultural treatments;

(1) No timber harvesting shall occur on lands classified as not suited for timber production pursuant to §219.14 except for salvage sales, sales necessary to protect other multiple-use values or activities that meet other objectives on such lands if the forest plan establishes that such actions are appropriate. These lands shall continue to be treated for reforestation purposes if necessary to achieve the multiple-use objective of the plan.

(2) The selected sale schedule provides the allowable sale quantity for the first planning period. Within the planning period, the volume of timber to be sold in any one year may exceed the average annual allowable sale quantity so long as the total amount sold for the planning period does not exceed the allowable sale quantity. Nothing in this paragraph prohibits salvage or sanitation harvesting of timber stands which are substantially damaged by fire, windthrow, or other catastrophe, or which are in imminent danger of insect or disease attack and where such harvests are consistent with silvicultural and environmental standards. Such timber may either substitute for timber that would otherwise be sold under the plan or, if not feasible, be sold over and above the planned volume.

(3) When trees are cut to achieve timber production objectives, the cuttings shall be made in such a way as to assure that the technology and knowledge exists to adequately restock the lands within 5 years after final harvest. Research and

experience shall be the basis for determining whether the harvest and regeneration practices planned can be expected to result in adequate restocking. Adequate restocking means that the cut area will contain the minimum number, size, distribution, and species composition of regeneration as specified in regional silvicultural guides for each forest type. Five years after final harvest means 5 years after clearcutting, 5 years after final overstory removal in shelterwood cutting, 5 years after the seed tree removal cut in seed tree cutting, or 5 years after selection cutting.

(4) Cultural treatments such as thinning, weeding, and other partial cutting may be included in the forest plan where they are intended to increase the rate of growth of remaining trees, favor commercially valuable tree species, favor species or age classes which are most valuable for wildlife, or achieve other multiple-use objectives.

(5) Harvest levels based on intensified management practices shall be decreased no later than the end of each planning period if such practices cannot be completed substantially as planned.

(6) Timber harvest cuts designed to regenerate an even-aged stand of timber shall be carried out in a manner consistent with the protection of soil, watershed, fish and wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource.

(7) Timber harvest and other silvicultural treatments shall be used to prevent potentially damaging population increases of forest pest organisms. Silvicultural treatments shall not be applied where such treatments would make stands susceptible

to pest-caused damage levels inconsistent with management objectives.

(d) *Even-aged management.* When openings are created in the forest by the application of even-aged silviculture, the following management requirements apply;

(1) Openings shall be located to achieve the desired combination of multiple-use objectives. The blocks or strips cut shall be shaped and blended with the natural terrain, to the extent practicable, to achieve aesthetic, wildlife habitat, or other objectives established in the plan. Regional guides shall provide guidance on dispersion of openings in relation to topography, climate, geography, local land use patterns, forest types or other factors. As a minimum, openings in forest stands are no longer considered openings once a new forest is established. Forest plans may set forth variations to this minimum based on site-specific requirements for achieving multiple-use objectives. Regional guides shall provide guidance for determining variations to this minimum in the forest plan, based on requirements for watershed, wildlife habitat, scenery or other resource protection needs, or other factors.

(2) Individual cut blocks, patches, or strips shall conform to the maximum size limits for areas to be cut in one harvest operation established by the regional guide according to geographic areas and forest types. This limit may be less than, but will not exceed, 60 acres for the Douglas-fir forest type of California, Oregon, and Washington; 80 acres for the southern yellow pine types of Alabama, Arkansas, Georgia, Florida, Louisiana, Mississippi, North Carolina, South Carolina, Oklahoma, and Texas; 100 acres for the hemlock-sitka spruce forest type of coastal Alaska; and 40 acres for all other forest

types except as provided in paragraphs (d)(2)(i) through (iii) of this section:

(i) Cut openings larger than those specified may be permitted where larger units will produce a more desirable combination of net public benefits. Such exceptions shall be provided for in regional guides. The following factors shall be considered in evaluating harvest cuts of various sizes and shapes to determine size limits by geographic areas and forest types; Topography; relationship of units to other natural or artificial openings and proximity of units; coordination and consistency with adjacent forests and regions; effect on water quality and quantity; visual absortion capability; effect on wildlife and fish habitat; regeneration requirements for desirable tree species based upon the latest research findings; transportation and harvesting system requirements; environmental and forest pest hazards to regeneration, residual trees, and surrounding stands; and the relative total costs of preparation and administration, transportation requirements, harvesting, site preparation, planting stocking control, and future stand tending of harvest cuts of various sizes and shapes. Specification for exceptions shall include the particular conditions under which the larger size is permitted and shall set a new maximum size permitted under those conditions.

(ii) Size limits exceeding those established in paragraphs (d)(2) and (d)(2)(i) of this section are permitted on an individual timber sale basis after 60 days' public notice and review by the Regional Forester.

(iii) The established limit shall not apply to the size of areas harvested as a result of natural catastrophic condition such as fire, insect and disease attack, or windstorm.

(e) *Riparian areas.* Special attention shall be given to land and vegetation for approximately 100 feet from the edges of all perennial streams, lakes, and other bodies of water. This area shall correspond to at least the recognizable area dominated by the riparian vegetation. No management practices causing detrimental changes in water temperature or chemical composition, blockages of water courses, or deposits of sediment shall be permitted within these areas which seriously and adversely affect water conditions or fish habitat. Topography, vegetation type, soil, climatic conditions, management objectives, and other factors shall be considered in determining what management practices may be performed within these areas or the constraints to be placed upon their performance.

(f) *Soil and water.* Conservation of soil and water resources involved the analysis, protection, enhancement, treatment, and evaluation of soil and water resources and their responses under management and shall be guided by instructions in official technical handbooks. These handbooks must show specific ways to avoid or mitigate damage, and maintain or enhance productivity on specific sites. These handbooks may be regional in scope or, where feasible, specific to physiographic or climatic provinces.

(g) *Diversity.* Management prescriptions, where appropriate and to the extent practicable, shall preserve and enhance the diversity of plant and animal communities, including endemic and desirable naturalized plant and animal species, so that it is at least as great as that which would be expected in a natural forest and the diversity of tree species similar to that existing in the planning area. Reductions in diversity of plant and animal communities and tree species from that which would be expected in a natural forest, or from that similar to the existing

diversity in the planning area, may be prescribed only where needed to meet overall multiple-use objectives. Planned type conversion shall be justified by an analysis showing biological, economic, social, and environmental design consequences, and the relation of such conversions to the process of natural change.

Supreme Court, U.S.
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No. 97-16

In the Supreme Court of the United States

OCTOBER TERM, 1996

OHIO FORESTRY ASSOCIATION, INC., PETITIONER

v.

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether respondents' challenge to the Wayne National Forest Land and Resource Management Plan (LRMP) developed by the United States Forest Service in accordance with the National Forest Management Act of 1976 presents a justiciable controversy.

2. Whether the court of appeals erred in holding that the LRMP at issue in this case was inconsistent with applicable legal requirements.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 105 F.3d 248. The opinion of the district court granting summary judgment (Pet. App. 10a-48a) is reported at 845 F. Supp. 485. An earlier opinion of the district court (Pet. App. 49a-65a) is unreported. The administrative appeal decisions of the Chief of the United States Forest Service (Pet. App. 66a-77a, 78a-130a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1997. Petitions for rehearing were denied on April 7, 1997. Pet. App. 131a-132a. The

petition for a writ of certiorari was filed on July 1, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Agriculture's Forest Service is responsible for managing the 191 million acres of land that comprise the National Forest System. See 58 Fed. Reg. 19,369 (1993). Under the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976 (NFMA), the Secretary of Agriculture is required to "develop, maintain, and, as appropriate, revise land and resource management plans [LRMPs or forest plans] for units of the National Forest System." 16 U.S.C. 1604(a). The Act directs the Secretary to "provide for public participation in the development, review, and revision of land management plans," 16 U.S.C. 1604(d), and establishes certain criteria to which LRMPs must conform, 16 U.S.C. 1604(e) and (f).

Under current Forest Service regulations, a forest plan is, in essence, a programmatic statement of intent that operates prospectively in a manner analogous to a zoning ordinance. Forest plans are intended to "provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public benefits in an environmentally sound manner." 36 C.F.R. 219.1(a). They "guide all natural resource management activities and establish management standards and guidelines for the National Forest System." 36 C.F.R. 219.1(b). The plans "determine resource management practices, levels of resource production and management, and the availability and suitability of

lands for resource management." *Ibid.* An LRMP includes forest-wide management standards and guidelines, 36 C.F.R. 219.13-219.27, and establishes management area prescriptions applicable to future activities in each area of the forest, 36 C.F.R. 219.11(c). The standards and guidelines and the management area prescriptions govern future project-level decisions having ground-disturbing impacts. Plans also are required to identify those areas of the forest *not* suitable for timber production, 36 C.F.R. 219.14, and to establish the maximum allowable sale quantity (ASQ) of timber for a forest over the life of a plan, 36 C.F.R. 219.16.[1] Plans are generally revised on a 10-year cycle but must be revised at least every 15 years. 36 C.F.R. 219.10(g); 16 U.S.C. 1604(f)(5)(A).

Because individual land use decisions must be consistent with the forest plan, a plan provision that forbids particular activities within a national forest (or portion thereof) is dispositive: such activities cannot go forward. See 16 U.S.C. 1604(i) ("Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans."). If a proposed site-specific activity is not consistent with the forest plan, the Forest Service may "[m]odify the proposal to make it consistent with the forest plan"; "[r]eject the proposal"; or "[a]mend the plan to permit the proposal." 53 Fed. Reg. 26,836 (1988).

To date, most forest plans generally have not identified specific ground-disturbing activities (such as

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[1] ASQ is defined as the "quantity of timber that may be sold from the area of suitable land covered by the forest plan for a time period specified by the plan." 36 C.F.R. 219.3.

timber-cutting or road-building) that are permitted or required to occur without further scrutiny. Rather, the agency undertakes an individualized assessment of the likely environmental effects of a proposed on-the-ground activity. See 53 Fed. Reg. 26,832 (1988); 58 Fed. Reg. 19,370-19,371 (1993); *Sierra Club* v. *Robertson*, 28 F.3d 753, 758 (8th Cir. 1994). Thus, even if a proposed site-specific activity is consistent with the LRMP, it will not go forward if it is determined (either in isolation or upon consideration of its cumulative effects together with other individual land use decisions) to have unacceptable environmental impacts.

2. The Forest Service is authorized by the NFMA to utilize both "evenaged" and "unevenaged" timber harvesting techniques. An "evenaged" management technique is one "aimed at creating a regeneration of trees which are essentially the same age." Pet. App. 2a. One evenaged technique is clearcutting, which involves the removal of all trees within a given area at the same time. *Ibid.* Other evenaged techniques are seed tree and shelterwood cutting, in which some trees in an area are left standing for a time to assist in the generation of new trees around them, and then are cut down to leave only younger trees of the same age. *Id.* at 15a. The NFMA directs the Secretary to "insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an evenaged stand of timber will be used as a cutting method on National Forest System lands only where" specified criteria have been satisfied. 16 U.S.C. 1604(g)(3)(F). The Secretary is required, in particular, to ensure that evenaged management techniques "are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation,

and esthetic resources, and the regeneration of the timber resource." 16 U.S.C. 1604(g)(3)(F)(v). The Act further provides that clearcutting may be used as a method of evenaged harvesting only where "it is determined to be the optimum method * * * to meet the objectives and requirements of the relevant land management plan." 16 U.S.C. 1604(g)(3)(F)(i).

3. a. This case involves a challenge to the LRMP developed for the Wayne National Forest in southern Ohio and approved by the Regional Forester in January 1988. In accordance with current planning regulations, the Wayne LRMP divided the forest into various management areas, identified forest lands not suitable for timber production, adopted standards and guidelines to guide subsequent harvesting decisions and to protect riparian areas, and established an overall ASQ for timber production from the Forest. However, the plan did not authorize or implement any activities that would have immediate on-the-ground impacts.

The Wayne LRMP addressed the issue of aggregate timber production by designating 126,107 (out of 176,787) federally owned acres in the forest as suitable for timber production, and by setting the ASQ at an average of 7.5 million board feet per year (*i.e.*, 75 million board feet total) during the first decade of the plan. See Plan 4-7, 4-180; Record of Decision (ROD) 18, 19; Pet. App. 33a.[2] The plan "provide[d] for evenaged management on 80 percent of the suitable forest land and for uneven-aged management on the remaining 20 percent." ROD 18; see Plan 3-5 ("Approxi-

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[2] We have lodged a copy of the Land and Resource Management Plan for the Wayne National Forest, as well as the Record of Decision, with the Clerk of this Court.

mately 21 percent of the suitable timber land will be managed under an uneven-aged silvicultural system," with "even-aged management on the remaining 79 percent of the suitable acres"); Pet. App. 16a.[3]

Although the LRMP designated 126,107 acres within the forest as suitable for timber production, it projected that only 7,835 acres would be harvested during the first decade of the plan. Plan 4-180. Of that acreage, it was projected that 5,075 acres would be harvested by evenaged methods and 2,760 acres by unevenaged methods. *Ibid.*; see Pet. App. 16a. The LRMP explained the rationale for timber management and harvesting techniques; the respective advantages of seed tree, shelterwood, and clearcutting for particular locations and types of species; and the circumstances that would render clearcutting the optimal method to meet the overall objectives of the LRMP. See Plan App. C; Pet. App. 20a-26a.

The Regional Forester issued a Record of Decision (ROD) explaining the forest plan, as well as his reasons for selecting it from among seven alternatives. The ROD observed that "[t]he emphasis of the Forest

[3] Appendix C to the LRMP explained the Forest Service's choice of vegetation management practices for each "management area" of the forest. For management areas 3.1, 3.2, 3.3, and 6.1, Appendix C projected the use of evenaged techniques as the primary method of timber harvesting. Plan App. C-6 to C-7; see also Plan 4-90 to 4-91, 4-98, 4-104, 4-118 to 4-119. Management area 3.1 contains 28,086 acres of land found to be suitable for timber harvesting; management area 3.2 contains 13,362 such acres; management area 3.3 contains 48,553 such acres; and management area 6.1 contains 9,641 such acres. See Plan 4-168, 4-170, 4-172, 4-174. Taken together, those management areas contain a total of 99,642 suitable acres—79% of the 126,107 acres identified by the Plan (see Plan 4-7) as suitable for timber harvesting.

Plan is not on site-specific decisions or specific outputs." ROD 38. It explained:

> As a long-range strategy for the Forest, this Forest Plan and the accompanying FEIS [final environmental impact statement] are programmatic in nature. During implementation, when the various projects are designed, more site-specific analyses will be developed. These analyses may result in environmental assessments, environmental impact statements or categorical exclusions and, possibly, an amendment or revision of the Forest Plan.

Ibid.

b. Respondents Sierra Club and Citizens Council on Environmental Control (Citizens Council) each filed an administrative appeal from the Regional Forester's decision approving the plan.[4] In his decision rejecting the Sierra Club's administrative appeal, the Chief of the Forest Service emphasized that the plan did not incorporate binding decisions to undertake individual timber sales. Thus, in addressing the contention that the plan would permit timber harvesting on land that should have been designated as not suitable for timber production (see 16 U.S.C. 1604(k)), the Chief observed that, "[d]uring implementation of the Forest Plan, the costs and benefits of different ways to carry out timber sales are evaluated on a sale-by-sale basis." Pet. App. 70a; see also *id.* at 75a ("the Forest Plan represents only one level in decision making about the management of the Wayne

[4] Pursuant to Forest Service regulations, the decision by a Regional Forester to approve an LRMP is subject to administrative appeal by members of the public. See 36 C.F.R. Pt. 217, 219.10(d).

National Forest and * * * final decisions are yet to be made on many matters of evident concern to the appellants"). With respect to clearcutting in particular, the Chief explained that

> [t]he optimality determination in the Wayne Forest Plan is appropriate as programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain areas of the forest to achieve specific management objectives. However[,] the analysis and final decision on the appropriateness of even-aged management, or the optimality of clearcutting, must be made as a site-specific determination at the project level during Forest Plan implementation and must follow National Environmental Policy Act procedures.

Id. at 76a. In rejecting the appeal filed by Citizens Council, the Chief similarly emphasized that decisions regarding individual projects were not dictated by the plan and would be made only after site-specific analysis. See *id.* at 98a-99a, 100a, 103a.

4. Subsequent to their administrative appeals, respondents Sierra Club and Citizens Council filed suit challenging the Wayne Forest LRMP. They argued, *inter alia*, that the forest plan was biased towards timber harvesting and, in particular, towards clearcutting. With respect to standing, respondents alleged in their complaint that their members visit the Wayne National Forest for recreational, avocational, occupational, and professional purposes. Pet. App. 134a. Specifically, they alleged that their members "visit portions of the Forest which under the current management plan for the Forest have been or will be subject to clearcutting or other forms of logging." *Id.* at 134a-135a. The complaint further alleged that the

actions of the Forest Service would "result in direct and substantial injury to the plaintiffs and their members by reducing their enjoyment of, and ability to use, the Wayne." *Id.* at 135a. The requested relief included, *inter alia*, "an injunction prohibiting further timber sales and clearcutting until the plan and its environmental impact statement are revised, subject to public and administrative review, to bring them into conformity with law." *Id.* at 144a. Petitioner Ohio Forestry Association intervened as a defendant in the district court.

The district court granted the government's motion for summary judgment. Pet. App. 10a-48a. Neither petitioner nor the government contended that the suit was non-justiciable. The district court's only reference to the issue was its statement that, "[i]n those management prescriptions which include clearcutting, there is a determination that clearcutting is the optimum method to meet the objectives and requirements of the Plan and the rationale for that determination is explained. This determination will substantially affect future decisions and is ripe for review." *Id.* at 20a (citation omitted).

The district court addressed and rejected respondents' challenges to the general policy determinations reflected in the plan, while noting that questions concerning the application of general policies to particular circumstances could be "deferred until there is a proposal of a specific timber sale at a specific site." Pet. App. 19a. The court stated that respondents' concerns about the consequences of clearcutting "were addressed by the Forest Service and that the applicable statutes and regulations

provide for a further assessment of these concerns on a site-specific basis when the Forest Service proposes to pursue specific projects in the forest." *Id.* at 17a. The district court also held that the Forest Service had acted reasonably in designating the total acreage suitable for timber production and in setting the ASQ at an average of 7.5 million board feet per year. See *id.* at 27a-37a.[5]

5. The court of appeals reversed. Pet. App. 1a-9a. The court first held that respondents' facial challenge to the forest plan was suitable for adjudication.[6] The

[5] The court noted in the latter regard that "[t]he ASQ does not determine the actual amount of timber which will be sold but sets the upper limit for the plan period. The actual amount of timber sales may be less and will depend on several unpredictable factors, including the budget of the Forest Service, the market for wood products and other conditions which may limit the practicality of offering sales at levels developed in the Plan." Pet. App. 33a.

[6] Relying principally on the intervening decision in *Sierra Club* v. *Robertson*, 28 F.3d 753 (8th Cir. 1994), the government contended in the court of appeals that respondents' suit was non-justiciable, both because respondents lacked standing to sue and because their claims were not ripe for adjudication. See Gov't C.A. Br. 21-30. The government did not argue that a forest plan is *never* subject to judicial challenge. The government's brief acknowledged that "[i]f, for example, a plan incorporated a final decision to close a specific area to off-road vehicles, the plan itself could result in imminent concrete injury to a party with an interest in the use of off-road vehicles in that area." *Id.* at 24-25. The government contended, however, that the Forest Service's promulgation of the LRMP for the Wayne National Forest did not give rise to actual or imminent injury to respondents, since the plan did not mandate that any particular activities would go forward, and since any proposed site-specific action would be scrutinized to ensure compliance with applicable environmental laws. *Id.* at 25-27.

Petitioner Ohio Forestry Association did not file a brief in the court of appeals. Rather, it filed a motion indicating its desire to join in, and adopt, the arguments made in the brief for the federal parties to the case. The Sixth Circuit granted that motion.

court found that respondents had standing to sue, asserting that LRMPs "represent significant and concrete decisions that play a critical role in future Forest Service actions." *Id.* at 4a. The court also held that respondents' claims were ripe for review, concluding that respondents "need not wait to challenge a specific project when their grievance is with an overall plan." *Ibid.*

On the merits, the court concluded that the forest plan was arbitrary and capricious because "the planning process was improperly predisposed toward clearcutting." Pet. App. 5a. After quoting the text of the NFMA requiring that evenaged management be "consistent" with the protection of natural resources and regeneration of the timber resource (see 16 U.S.C. 1604(g)(3)(F)(v)), the court expressed the view that the NFMA "contemplates that even-aged management techniques will be used only in exceptional circumstances," and it faulted the Wayne LRMP on the ground that the Forest Service "would utilize even-aged management logging as if it were the statutory rule, rather than the exception." Pet. App. 6a. The court asserted as well that "the Forest Service has a history of preferring timber production to other uses," and that "forest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse." *Id.*

at 7a. The court of appeals reversed the district court's order granting summary judgment for the government and remanded the case for further proceedings. *Id.* at 8a.[7]

ARGUMENT

In the government's view, the court of appeals erred both in finding respondents' challenge to the Wayne LRMP to be justiciable independent of any particular site-specific activity that would cause concrete injury to respondents' members, and in holding that the 1988 plan for the Wayne National Forest was inconsistent with applicable legal requirements. For several reasons, however, we do not believe that this case warrants the Court's review, especially in its present interlocutory posture. Although forest management planning is guided by planning regulations, each LRMP is forest-specific and contains management decisions pertinent to that particular forest. In the present case, moreover, the Forest Service's current management practices in the Wayne National Forest differ so significantly from the projections in the decade-old LRMP challenged by respondents that prolonged litigation regarding the validity of the plan would not be an efficient use of the resources of the

[7] Judge Batchelder concurred separately. Pet. App. 9a. She agreed with the majority that the case presented a justiciable controversy, and she "agree[d] that the record before [the court] supports a conclusion that the Forest Service has not complied with the mandates of the [NFMA] relative to even-aged management practices in adopting the Plan." *Ibid.* While believing that there were "serious questions and concerns about the management practices and policies of the Forest Service," however, she stated that she "d[id] not believe that the majority's largely undocumented broadside against the Forest Service is appropriate." *Ibid.*

Forest Service or of this Court. In light of the degree to which actual management practices have diverged from the plan's projections, the Forest Service has determined that the Wayne LRMP should be amended to reflect on-the-ground experience. In addition, the Forest Service has initiated a fresh review of its forest-planning process with the goal of revising it. The petition for a writ of certiorari should therefore be denied.

A. 1. As petitioner explains (see Pet. 8-9), the question whether forest plans are subject to judicial review in the context of a facial challenge is the subject of a conflict in the circuits. Like the Sixth Circuit in the instant case, the Seventh and Ninth Circuits have held that such a challenge is justiciable. See *Sierra Club* v. *Marita*, 46 F.3d 606, 610-614 (7th Cir. 1995); *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508, 1513-1518 (9th Cir. 1992). Those courts have primarily relied on the premise that forest plans direct the manner in which the Forest Service will conduct subsequent site-specific activities. See *Marita*, 46 F.3d at 614 ("The Sierra Club is appealing the issuance of a final management plan which will, unless amended, direct Service management activities in" specified locations); *Mumma*, 956 F.2d at 1516 ("we must conclude that the management plan plays some, if not a critical, part in subsequent decisions"; "[t]o the extent that the plan predetermines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge").

The Eighth and Eleventh Circuits, by contrast, have held that a plan-level challenge is not ordinarily justiciable in the absence of some site-specific activity implementing the LRMP. See *Sierra Club*

v. *Robertson*, 28 F.3d 753, 757-760 (8th Cir. 1994); *Wilderness Society* v. *Alcock*, 83 F.3d 386, 389-391 (11th Cir. 1996). The Eighth Circuit concluded that "[t]he mere existence of [a] Forest Plan does not produce an imminent injury in fact" because "[a]doption of the Plan does not effectuate any on-the-ground environmental changes" or "dictate that any particular site-specific action causing environmental injury must occur." *Robertson*, 28 F.3d at 758. The Eleventh Circuit also held plan-level challenges to be generally non-justiciable. It explained that "no site-specific action will be taken pursuant to the Plan without a second stage of decisionmaking," *Alcock*, 83 F.3d at 390, and it concluded on that basis that "until a site-specific action has been proposed, appellant's claimed injury is not ripe for judicial review," *id.* at 391.[8]

In holding that the plaintiffs' plan-level challenges were non-justiciable, both the Eighth and Eleventh

[8] Both the Eighth and Eleventh Circuits recognized that the Forest Service's decisions regarding proposed site-specific activities would be subject to judicial challenge. See *Robertson*, 28 F.3d at 759; *Alcock*, 83 F.3d at 390. Both courts also recognized that judicial review of such activities could include scrutiny of the programmatic guidance contained in an LRMP, insofar as such guidance constitutes part of the agency's rationale for an individual project decision that has a concrete, on-the-ground impact. See *Robertson*, 28 F.3d at 759 (a plaintiff who will be injured by a proposed site-specific activity "may assert that the proposed site-specific action is not consistent with the Plan, or that the Plan as it relates to the proposed site-specific action is inconsistent with the governing statutes, or both"); *Alcock*, 83 F.3d at 390 (noting government's concession that the plaintiff in a suit concerning a site-specific activity "can challenge both the site-specific action as well as the Plan-level decision(s) underlying the specific action").

Circuits emphasized that the LRMPs at issue did not incorporate binding decisions regarding individual site-specific actions. See *Robertson*, 28 F.3d at 758; *Alcock*, 83 F.3d at 390-391. Neither court addressed the question whether plan provisions that *did* incorporate such binding decisions would be subject to immediate judicial review. Nothing in those courts' reasoning suggests, however, and the government does not believe, that an agency decision otherwise suitable for immediate judicial review should be immune from challenge simply because it is contained within a "plan." Cf. note 6, *supra*.[9]

2. In the government's view, the plan-level challenges presented in the instant case are not appropriate for judicial resolution. Respondents alleged that the LRMP for the Wayne National Forest (1) overemphasized timber harvesting at the expense of other uses of the forest (by designating too many acres as suitable for timber harvesting and by setting the ASQ at too high a level), and (2) improperly relied on clearcutting as the predominant method of harvesting. Those purported flaws in the Wayne forest plan cannot be said to subject respondents or their members to any injury that is "certainly impending." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990). The LRMP at issue here does not require that clearcutting must occur at all, much less that it must occur at a particular location. In rejecting the administrative appeals in this case, the Chief of the Forest Service

[9] Cf. *Bennett* v. *Spear*, 117 S. Ct. 1154, 1164-1165 (1997) (plaintiffs had standing to challenge Fish and Wildlife Service biological opinion that changed the legal landscape under which the Bureau of Reclamation would operate, even though the opinion did not require the Bureau to undertake a particular course of action).

emphasized that the propriety of individual timber sales would be subject to site-specific inquiries in which the public would be given an opportunity to participate. See pages 7-8, *supra*.[10] Divorced from any final determination by the Forest Service that clearcutting (or other timber harvesting) should occur at a particular location, litigation regarding the plan projections challenged by respondents in this case is both premature and needlessly abstract.[11]

The Forest Service's management of the Wayne National Forest since the LRMP was adopted confirms that activities *permitted* by a forest plan will not necessarily go forward. As noted above, the ASQ under the LRMP at issue here is 75 million board feet during the first decade of the plan. Forest Service statistics indicate, however, that a total of only 29.8

[10] Congress has since enacted a law that specifically requires public notice and comment, along with a right of administrative appeal, with respect to proposed site-specific activities covered by a forest plan. See Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, § 322, 106 Stat. 1419 (1992) (16 U.S.C. 1612 note). The administrative decision on appeal of any such site-specific activity would then be final agency action subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* See, *e.g.*, Pub. L. No. 102-381, § 322(d)(4), 106 Stat. 1420.

[11] Since the approval of the Wayne LRMP, respondents have twice pursued successful administrative appeals challenging proposed site-specific timber harvesting activities in the Wayne National Forest. In decisions issued November 20, 1992, the Forest Supervisor concluded on each appeal that the relevant decision documents did not adequately justify the conclusion that clearcutting was the optimal method of harvest for the site in question. Thus, respondents' own experience confirms that proposed activities, even if consistent with the plan, will be subject to meaningful site-specific analysis before they are allowed to go forward.

million board feet of timber was sold in the Wayne National Forest during the years 1988-1996. See Forest Plan Estimates v. Actual Accomplishments (lodged with the Clerk of this Court). Only 2.0 million board feet of timber were sold in the forest during the four-year period from 1993 through 1996. *Ibid.* Although the plan projected that 5,075 acres would be harvested by evenaged management techniques during the first decade (Plan 4-180), only 1,540 acres were actually so harvested. See Summary of Harvest on Wayne NF from STARS Database (lodged with the Clerk of this Court) (1,434 acres harvested by clearcutting, 106 by shelterwood cutting); see also Pet. 20 n.10.[12] Thus, the plan projections that were the subject of this lawsuit had largely been overtaken by events by the time that the court of appeals issued its decision.

[12] Since 1991, each congressional appropriation for the Forest Service has provided that no appropriated funds "shall be used for timber sale preparation using clearcutting in hardwood stands in excess of 25 percent of the fiscal year 1989 harvested volume in the Wayne National Forest, Ohio." *E.g.*, Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, Tit. II, 104 Stat. 1942 (1990). In June 1992, the Chief of the Forest Service issued policy guidance to Regional Foresters and Station Directors that was intended "to reduce clearcutting on National Forest System lands." See Memorandum from F. Dale Robertson to Regional Foresters and Station Directors, Re: Ecosystem Management of the National Forests and Grasslands, Attach. 2 (June 4, 1992). The policy limited clearcutting to specified circumstances, and the Chief forecast that "[t]his clearcutting policy combined with the new USDA-Forest Service ecosystem management can reduce clearcutting by as much as 70 percent from FY 1988 levels." *Ibid.* We have lodged a copy of that policy guidance with the Clerk of this Court.

3. For the foregoing reasons, the Sixth Circuit erred in holding respondents' plan-level challenge to be suitable for adjudication. We believe, however, that the instant case provides an inappropriate vehicle for this Court's resolution of the jurisdictional issues that have divided the courts of appeals.

a. The interlocutory posture of the case weighs against a grant of certiorari. The court of appeals held that "[t]he Forest Service's planning process * * * was not in accordance with the law," Pet. App. 8a, but it did not determine what relief should be ordered, choosing instead (see *ibid.*) to remand the case to the district court for further proceedings.[13] This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," even where the court of appeals has resolved the merits of the case and only the "determination of an appropriate remedy" remains. *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari); see also *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court").

The practical impact of plan-level adjudication depends significantly upon the scope of the relief that is ordered if a plan is found wanting. Respondents' complaint requests, *inter alia*, "an injunction prohibiting further timber sales and clearcutting until the plan and its environmental impact statement are revised." Pet. App. 144a. In our view, even if the court of appeals were correct that this suit is justiciable, such a remedy would be substantially overbroad. In determining whether a particular site-specific activity should go forward, the Forest Service should not be permitted to *rely* on a plan provision that the court of appeals has held to be invalid. The court of appeals' invalidation of the plan should not, however, preclude the agency from proceeding with projects that have been determined, after adequate site-specific analysis, to be consonant with applicable environmental laws. Cf. 16 U.S.C. 1604(c) ("Until such time as a unit of the National Forest System is managed under plans developed in accordance with [the Act], the management of such unit may continue under existing land and resource management plans.").

Moreover, an injunction against further timber sales and clearcutting would require a showing that the particular activities sought to be enjoined would injure respondents or their members. In the absence of any ruling below addressing the remedial question, the practical effect of the court of appeals' decision remains unclear. That uncertainty weighs against a grant of certiorari.

b. Neither petitioner nor the government contended in the district court that respondents' claims were not justiciable.[14] As a result, respondents were

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[13] On August 26, 1997, respondents filed in the district court a Renewed Motion for Summary Judgment and Injunctive Relief, with attached affidavits addressed to the issue of standing.

[14] The government first raised the jurisdictional issue in its brief to the Sixth Circuit, after the intervening decision of the Eighth Circuit in *Sierra Club* v. *Robertson*, *supra*, holding that facial challenges to forest plans are generally nonjusticiable. Petitioner did not file a brief in the court of appeals, though it submitted (and the court granted) a motion to

not called upon to submit (and the courts below had no opportunity to consider) evidence clarifying or substantiating their claims of injury and how those claims are tied to the Wayne LRMP and its relationship to the Forest Service's on-the-ground decisions. The failure of both petitioner and the government to raise their justiciability objections at the outset of the lawsuit may impede this Court's consideration of those issues, and may therefore render this case, in its current posture, an unsuitable vehicle for resolution of the first question presented in the petition.[15]

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join in and adopt the arguments of the government. See note 6, *supra*. Petitioner first separately addressed the question of justiciability in its petition for rehearing with suggestion of rehearing en banc.

[15] The complaint in this case alleged that members of respondent organizations "visit portions of the Forest which under the current management plan for the Forest have been or will be subject to clearcutting or other forms of logging of trees as a result of the defendants' unlawful practices regarding below cost timber sales." Pet. App. 134a-135a. The phrase "subject to" is presumably intended to mean "potentially subject to" or "identified as suitable for." Although the Wayne LRMP set out a schedule of specific timber sales projected for the first three years (1988-1990) of the plan, see Plan A-2 to A-6, respondents did not allege that their members used those or any other identified tracts. Compare *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 887, 889 (1990) (*NWF*). Indeed, respondents' complaint, filed March 18, 1992 (see Pet. App. 133a), contained no allegations regarding identified sales that had actually gone forward. Because neither petitioner nor the government argued in the district court that respondents' claims were not justiciable, respondents were not called upon in the initial proceedings in the district court to clarify, or to support with evidentiary materials, their general claims of injury. Compare *NWF*, 497 U.S. at 889 (general allegations of injury

c. As we explain above (see pages 16-17, *supra*), the quantity of timber harvested under the 1988 LRMP for the Wayne National Forest has been substantially less than the amount projected in the plan. That disparity reinforces the government's view that respondents' plan-level challenge should not have been adjudicated. At the same time, however, the manner in which on-the-ground experience has diverged from the LRMP's projections suggests that prolonged litigation concerning the now-dated forest plan would not be an efficient use of the resources of the Forest Service or of this Court. Accordingly, the Forest Supervisor for the Wayne National Forest has "decided to amend the Wayne National Forest Land and Resource Management Plan (Forest Plan) to bring its vegetation management projections into conformance with what has happened on the ground since the 1988 Forest Plan approval and with what is expected to happen in the future." Letter from José A. Zambrana (Aug. 29, 1997) (lodged with the Clerk of

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that may be sufficient at the pleading stage are inadequate to survive motion for summary judgment); *Bennett* v. *Spear*, 117 S. Ct. at 1163-1164 (same).

As we explain above (see pages 18-19, *supra*), questions concerning the appropriate scope of relief in this case also remain open to the district court on remand. Any injunction against timber harvesting activities should be limited to projects that would cause concrete harm to respondents or their members. Respondents' Renewed Motion for Summary Judgment and Injunctive Relief is currently pending before the district court on remand, and respondents have submitted affidavits directed to the issue of standing. See note 13, *supra*. Thus, the proceedings on remand may clarify the extent to which respondents are actually likely to suffer injury as a result of activities conducted under the Wayne LRMP.

this Court). The Forest Supervisor explained that "it is now clear that the facts underlying the dispute over the Wayne National Forest Plan have substantially changed and that continuing to litigate over decade old projections is fruitless." *Ibid.*

The instant case involves a challenge to federal administrative action. The Forest Service is the principal party in interest; petitioner's stake in the litigation is largely derivative. In light of the Forest Service's undertaking to bring the now-outdated controversy regarding the 1988 plan to a close as expeditiously as possible, review by this Court is not warranted.

4. In declining to adjudicate plan-level challenges, the Eighth and Eleventh Circuits have relied on the fact that existing LRMPs typically do not incorporate final decisions regarding individual site-specific actions. See *Robertson*, 28 F.3d at 758 ("Adoption of the Plan does not effectuate any on-the-ground environmental changes. Nor does it dictate that any particular site-specific action * * * must occur."); *Alcock*, 83 F.3d at 390 ("no site-specific action will be taken pursuant to the Plan without a second stage of decisionmaking"). Nothing in the NFMA, however, would prohibit the Forest Service from altering its planning process so that a greater range of binding determinations would be made at the programmatic level. The Forest Service has recently initiated a fresh reexamination of the regulatory provisions governing the formulation of LRMPs. Pursuant to the Federal Advisory Committee Act, the Forest Service recently established a charter for a Committee of Scientists "to provide scientific and technical advice to the Secretary of Agriculture and the Chief of the Forest Service on improvements that can be

made to the land and resource management planning process." 62 Fed. Reg. 43,691 (Aug. 15, 1997).[16] Thus, it is unclear whether any decision this Court might render concerning the reviewability of existing forest plans would address the sort of ripeness and standing issues that may arise in the future by virtue of changes in the planning process.

B. The court of appeals held that the LRMP for the Wayne National Forest was arbitrary and capricious because it "would utilize even-aged management logging as if it were the statutory rule, rather than the exception." Pet. App. 6a. In the view of the court of appeals, the Wayne LRMP's projections concerning the anticipated use of evenaged management violated a purported NFMA requirement that "even-aged management techniques will be used only in exceptional circumstances." *Ibid.* In support of that proposition, however, the court of appeals relied (see *ibid.*) on 16 U.S.C. 1604(g)(3)(F)(v), which states only that even-aged management techniques must be "carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource."

In *Sierra Club* v. *Espy*, 38 F.3d 792, 799 (5th Cir. 1994), the Fifth Circuit stated that

> the Forest Service may use even-aged management as an overall management strategy. That even-aged management must be the optimum or appropriate method to accomplish the objectives and requirements set forth in an LRMP does not

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[16] The Forest Service had previously issued a notice of proposed rulemaking regarding possible changes in the forest planning process on April 13, 1995. See 60 Fed. Reg. 18,886.

> mean that even-aged management is the exception to a rule that purportedly favors selection management. Similarly, the requirement that even-aged logging protect forest resources does not in itself limit its use. Rather, these provisions mean that the Forest Service must proceed cautiously in implementing an even-aged management alternative and only after a close examination of the effects that such management will have on other forest resources.

After reviewing the Act's legislative history, the Fifth Circuit concluded that "NFMA does not bar even-aged management or require that it be undertaken only in exceptional circumstances; it requires that the Forest Service meet certain substantive restrictions before it selects even-aged management." *Id.* at 800.

The Sixth Circuit did not explain its determinations that evenaged management techniques may be employed "only in exceptional circumstances," or that the Forest Service had improperly "utilize[d] even-aged management logging as if it were the statutory rule, rather than the exception." Pet. App. 6a. The court of appeals' disapproval of the Wayne LRMP may have been based on the fact that the plan "provide[d] for even-aged management on 80 percent of the suitable forest land." ROD 18; see Pet. App. 2a ("The plan designated that eighty percent of all timbering techniques would be 'even-aged management.'"). The court's opinion could be read to hold that a forest plan which identifies evenaged management as the anticipated primary method of timber harvesting is *ipso facto* violative of the NFMA. If that was the ground for the Sixth Circuit's invalidation of the Wayne

LRMP, its ruling is squarely in conflict with the Fifth Circuit's decision in *Sierra Club* v. *Espy* and has no basis in the NFMA, which neither explicitly nor implicitly requires that unevenaged management must be used as the predominant method of timber harvesting, either within a particular forest or in the National Forest system as a whole. As explained above, evenaged management need only be "carried out in a manner" that is "consistent" with protection of various resources and regeneration of the timber resource.

Such an "exceptional circumstances" rule, moreover, could have a very substantial impact upon the Forest Service's management of public lands. Under that approach, a forest plan that projected that even-aged management would be used as the predominant method of timber harvesting could be deemed unlawful on that basis alone. Indeed, quite apart from plan-level challenges, the Forest Service could be found (under the approach described above) to be in violation of the NFMA whenever it used evenaged management as the primary harvesting method on a particular forest, even if each individual timber sale was supported by precisely the determinations required by the Act. If the Sixth Circuit had unambiguously adopted that position, its decision might well warrant review by this Court.

The Sixth Circuit's opinion is, however, susceptible of a narrower construction. The court's reference to "exceptional circumstances" could be construed as essentially a restatement of the statutory requirement that use of evenaged management must be premised on specific findings that are not required for unevenaged techniques. See 16 U.S.C. 1604(g)(3)(F). In asserting that the Wayne LRMP employed even-

aged management "as if it were the statutory rule," the court of appeals might have meant that the agency had failed adequately to support its projection that a substantial majority of the suitable acreage could appropriately be harvested through the use of even-aged methods. We would not agree with that assessment of the Wayne LRMP: in our view, the Forest Service adequately explained and supported its projections based on the information available to it at the time the plan was issued. But any error that the court of appeals may have committed in applying Section 1604(g)(3)(F) to a particular set of facts would raise no issue of general importance warranting this Court's review. We believe that the district court on remand should be given the initial opportunity to construe and apply the Sixth Circuit's opinion.[17]

C. Given the uncertainty regarding the full scope and impact of the court of appeals' opinion on the merits, the interlocutory posture of the case (see pages 18-19, *supra*), the dearth of record evidence bearing on respondents' claims of injury (see pages 19-20, *supra*), the limited current importance of the validity of the Wayne LRMP's projections (see pages

[17] The government's petition for rehearing with suggestion of rehearing en banc asserted that "[t]he panel's holding in this case is in direct conflict with the law of the Fifth Circuit on the interpretation of [16 U.S.C. 1604]." Gov't Pet. for Reh'g 12. On further consideration, we believe that statement to have been too unequivocal and thus ill-advised, at least at this interlocutory juncture. The Sixth Circuit's opinion is certainly susceptible of a construction that would place that court directly in conflict with the Fifth Circuit. We now believe, however, that the Sixth Circuit's opinion is susceptible of a narrower construction as well, and further proceedings in this case may shed light on that question.

21-22, *supra*), and the Forest Service's initiation of a process to reexamine the manner in which forest planning is conducted (see pages 22-23, *supra*), review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-16

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. The Sixth Circuit here reached out, in a non-justiciable case, to mount a political and policy-based broadside against a federal agency. The court below found that the statutes under which the Forest Service operates pervasively bias the agency, causing it to reach results that appeared unwisely (to the court below) to favor timber interests. As shown in the Petition (at 14-17), this concept of "bias" has no legal support and denies to co-equal branches of government and their decisionmaking the basic respect the judiciary owes them.

To provide a foundation for its broadside, the Sixth Circuit adopted a standard of justiciability that directly conflicts with decisions of two other circuits. This expansive view of standing and ripeness provides a precedential basis for further facial attacks on the agency's 10-15 year forest plans.

On the merits, the Sixth Circuit not only invalidated the Wayne Forest Plan, but the court prescribed binding rules of law for all National Forests within the Sixth Circuit. It limited timber harvesting that produces an even-aged stand of trees to "exceptional circumstances" and granted recreational uses a preference over timber uses. The agency's acquiescence in these erroneous standards within the Sixth Circuit would mean that its future decisions under those standards could not be challenged effectively by affected forest products companies.

Thus, unless this Court intervenes, the Sixth Circuit's value-laden policy pronouncements on the proper uses of National Forests will have worked a permanent and unreviewable change to the National Forest Management Act, to the direct detriment of Petitioner's members, other forest products companies, and timber-dependent communities. While the United States might sometimes be commended for "turning the other cheek" and acquiescing in an erroneous decision, this is not such a case. The pervasive mischief of this decision will continue to affect Petitioner's members, and

the clear conflict in the circuits on both the merits and justiciability issues will be perpetuated. The Sixth Circuit's decision not only expands federal court jurisdiction beyond constitutional bounds, but also illustrates why the Framers limited the jurisdiction of the federal courts to the resolution of concrete cases, not broad debates over general policy.

2. Federal Respondents concur almost completely with Petitioner about the significance of the justiciability and merits issues presented, the conflict in the circuits on both issues, and the fundamental legal errors in the Sixth Circuit's rulings on both issues. Federal Respondents nonetheless labor to justify their opposition to the Petition. That opposition takes the form of soothsaying about what might happen in the future to render the pernicious precedents created by this case less important than they appear to be. The opposition to certiorari rests on gossamer-thin and ultimately erroneous speculation.

3. Federal Respondents (at 13) agree that the Article III issue (the justiciability of a facial challenge to a forest plan by plaintiffs claiming environmental injury from timber harvesting) "is the subject of a conflict in the circuits." The court below engaged in "premature and needlessly abstract" review and lacked jurisdiction under decisions like *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Fed. Opp. 15-16; *see id.* at 3-8, 13-18; Pet. 8-13. The procedural rationales Federal Respondents offer for declining review are insubstantial.

a. Federal Respondents argue (at 19-20) that the Sixth Circuit's decision on justiciability should not be reviewed because the court had before it only the pleadings. But that is precisely the point. Those pleadings did not demonstrate any Article III controversy, though it is the "responsibility of the complainant" to affirmatively allege facts in the "pleadings" to overcome the "presum[ption] that federal courts lack jurisdiction." *Renne v. Geary*, 501 U.S. 312, 316 (1991).

Nor is the *legal* defect in the Sierra Club's theory for Article III jurisdiction curable by a *factual* affidavit.[1]

b. The Forest Service argues (at 22-23) that the Court need not resolve the conflict over the jurisdictional issue because, in the future, the agency *might consider* amending its regulations to alter the nature of its forest planning in a way that would create standing to facially challenge future plans. This non-committal statement should not delay this Court's review. The jurisdiction that Federal Respondents agree is lacking, coupled with the mature 3-to-2 circuit split and recurring injuries to Petitioner's members, warrant current review by this Court.[2]

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[1] On August 26, 1997, the Sierra Club filed in district court three standing affidavits that explain the factual basis for its claim that it suffers an Article III injury from the existence of a general planning document, the Wayne Forest Plan. *See* Sierra Club Opp. at 10-11; Mem. In Supp. Of Pls. Renewed Motion For Summ. J. And Inj. Relief (copy lodged with the Clerk of this Court). Those affidavits restate the pleaded theory of standing. The record now contains all the materials the Court might desire to resolve the jurisdictional issue.

[2] "The judiciary must not close the door to the resolution of the important questions" even if they would be arguably mooted in the future. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 127 (1974). Petitioner's members are suffering current injury as the Forest Service and district court, citing the Sixth Circuit's decision, have halted *uneven-aged* timber sales and timber sales generally. Continuing injuries to our interest in timber production will occur as long as the decision below remains in effect. District courts are already relying on the Sixth Circuit's distrust of the Forest Service and of even-aged management in enjoining timber harvesting. *See House v. United States Forest Serv.*, No. 96-446 (E.D.Ky. decided May 29, 1997); *Sierra Club v. Glickman*, No. 9:85-CV-69 (E.D. Tex. decided Aug. 14, 1997). A Complaint to enjoin the Daniel Boone Forest Plan and all timber harvesting on the basis of the Sixth Circuit's rulings on bias, even-aged

(continued...)

Further, it is *highly unlikely* that the Forest Service would change the planning regulations or a forest plan in a jurisdictionally-relevant way at this late date.[3] A general forest plan would cause an Article III environmental injury only if the forest plan process were transformed into an exercise of Soviet-style central planning that commits to specific ground-disturbing projects and specific output levels for a decade or more. No such regulatory change can be reasonably expected, as the 1991 and 1995 rulemaking proposals emphatically demonstrate. *See* note 3. Forest plans will continue to be general planning documents.

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[2](...continued)
management, and preference for recreation has been filed as *Kentucky Heartwood, Inc. v. Worthington*, No. 97-378 (E.D. Ky. Sept. 5, 1997). These cases compromise the National Forest System purpose of furnishing a continuous supply of timber. *See* 16 U.S.C. 475; *United States v. New Mexico*, 438 U.S. 696, 707, 714-15 (1978).

[3] The Department of Justice and the Forest Service have a longstanding interpretation that a forest plan is a programmatic statement of intent that does not dictate alterations of the on-the-ground environment. *See* Fed. Opp. 2-4, 7-8. The Administration's 1991 and 1995 proposals to amend the planning regulations, 36 C.F.R. Part 219, retained and *vigorously promoted* the concept that a forest plan does *not* dictate on-the-ground changes and environmental injury. *See* 60 Fed. Reg. 18886, 18897, 18923 (April 13, 1995); 56 Fed. Reg. 6508, 6513, 6516, 6518-19, 6530-31 (Feb. 15, 1991). Any *future* proposal is likely to continue this concept. And, regulatory change moves glacially. The agency's 1991-95 initiatives were withdrawn without a final rulemaking. GEN. ACCOUNTING OFFICE REP. B-277622, BUREAU OF LAND MANAGEMENT AND FOREST SERVICE: INFORMATION ON THE TIME SPENT ON MAJOR AND SIGNIFICANT RULES 17-18 (Aug. 20, 1997).

Hence, the jurisdictional issue presented by facial challenges to a general planning document will not go away.[4] Resolving the recurring jurisdictional issue now would be especially timely, to provide guidance before litigation begins on the imminent next generation of forest plans. *See* Pet. 13.

4. Federal Respondents agree (at 24-25) that if the court below ruled that forests cannot be primarily managed in even-aged stands, the "ruling is squarely in conflict with the Fifth Circuit's decision in *Sierra Club v. Espy* [38 F.3d 792, 799-800 (5th Cir. 1994)] and has no basis in the NFMA." Any general rule against even-aged management has a "very substantial impact upon the Forest Service's management of public lands," Fed. Opp. 25, and a very substantial impact on forest products companies and timber-dependent communities. *See* Pet. 18-21.

Federal Respondents offer (at 25-26) a remarkable interpretation of the Sixth Circuit's decision under which the statement that the NFMA allows even-aged management only in exceptional circumstances is somehow read merely to restate the requirements in 16 U.S.C. 1604(g)(3)(F). On this basis, the broad rationale of the actual Sixth Circuit decision on both the applicable standard (and the agency's inherent bias) is reduced to an innocuous and uncertworthy finding that the Forest Service failed to provide documentary support of compliance with the statutory standard.

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[4] This also answers Federal Respondents' suggestion that review be delayed because the agency may amend the forest plan to include the facts on implementation. Such a plan amendment would not alter the jurisdictional issue of whether a facial challenge to a forest plan (or an amended forest plan) is justiciable. The implementation facts, summarized at Fed. Opp. 16-17, simply confirm why litigation over a forest plan's *projections* is premature.

The answer is simply that this is not the Sixth Circuit's holding or its rationale, as Federal Respondents recognized when they sought rehearing below. *See* Fed. Opp. 26 n.17. Since § 1604(g)(3)(F) does not use the phrase "exceptional circumstances" or suggest that meaning, the court below was not restating the NFMA language, but adding an overriding gloss not contained in the statute itself. The opinion lacks any suggestion that the Wayne Forest Plan did not provide documentary support for its proposed level of even-aged logging. Instead, the court below concluded that, since the Forest Plan projected that "eighty percent of all timbering techniques would be 'even-aged,'" the Plan was unlawful as even-aged management cannot be the "statutory rule, rather than the exception." Pet. App. 4a, 6a. The court below *did indeed* conclude that even-aged management cannot be the "predominant method of timber harvesting" – a conclusion that "might well warrant review by the Court." Fed. Opp. 25. A "squarer conflict on a fundamental issue of forest management is harder to fathom." R. Lazarus, *Forestry Advance, Wetlands Retreat*, THE ENVTL. FORUM, March/April 1997, at 10.

5. Federal Respondents offer other strained objections to this Court's review of the justiciability and merits issues.

a. Federal Respondents suggest that the Wayne Forest Plan is out of date and not worth fighting for. But that misses the issue. The Sixth Circuit's disapproval of even-aged management and its preference for primitive recreation are not tied to this Plan. Rather, they establish legal limits that could well constrain *all* future forest plans within the Sixth Circuit.

By accepting review, the Court can assist those preparing the new forest plans and possibly revising the regulations. Only this Court's decision could provide definitive guidance on the constitutional and statutory sideboards within which regulatory discretion may be exercised and remove the existing

legal uncertainty on the reviewability of forest plans, the legality of even-aged management, and any legal preference for recreation.

b. This leaves Federal Respondents' argument (at 18-19) that, because the court of appeals reversed on jurisdictional and merits grounds, and remanded on remedy issues, the Court should not review an "interlocutory" order. The prospect that district court proceedings will follow an appellate decision may influence this Court's decision whether to grant certiorari where the outcome of the district court's decision on remand will affect the issue on which review is sought. This will not occur here.

The Sixth Circuit has issued a final decision on the jurisdictional and NFMA merits issues, and this Court would not benefit from further lower court proceedings on distinct *remedy* issues. This Court frequently reviews interlocutory orders to resolve the type of jurisdictional issues and important circuit conflicts presented here. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); ROBERT L. STERN ET AL. SUPREME COURT PRACTICE § 4.18, pp. 196-97 (7th ed. 1993). Appellate decisions that reverse and remand are not immune from this Court's scrutiny. *Id.* A ruling on whether jurisdiction exists and whether there has been any violation of law in connection with the current plan should logically precede further debates in lower courts on the remedy and the nature of any revised forest plan.[5]

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[5] The government's proposed narrow reading of the Sixth Circuit's opinion is fanciful on its face. Not surprisingly, the Federal Respondents' speculation (at 18-19, 21-22) that this case could be resolved by a narrow remedy or a non-significant amendment (36 C.F.R. 219.10(f)) to the Wayne Forest Plan has proven to be incorrect. On remand, the Sierra Club moved to enjoin two *uneven-aged* timber

(continued...)

6. The Sierra Club goes further afield in searching for ways to avoid the Court's scrutiny of the opinion below.

a. The Sierra Club argues (at 13-14) that this case does not present a circuit conflict on the justiciability of a facial challenge to a forest plan because timber sales have occurred. Yet, timber sales had also occurred in the two circuit court cases finding facial challenges to forest plans are not justiciable. *Sierra Club v. Robertson*, 28 F.3d 753, 756-57 (8th Cir. 1994); *Wilderness Soc'y v. Alcock*, 83 F.3d 386 (11th Cir. 1996) (timber sales briefed by plaintiffs, but not thought worthy of mention by the appellate court). By its abstract nature, a facial challenge at the "level of generality" of a forest plan is not ripe, where the plan itself causes no present injury. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 894 (1990);

---

[5](...continued)
sales and "enjoin[] defendants from implementing the current Forest Plan" until "a fair and unbiased planning process has developed a new set of alternatives to submit for public scrutiny and comment." Mem. In Supp. Of Pls. Renewed Mot. For Summ. J. & Inj. Relief at 2-3 (Aug. 26, 1997). On Sept. 5, District Court Judge Graham granted a temporary restraining order, finding that the Sixth Circuit had indeed found the entire Forest Plan "unlawful" because it "arbitrarily favored timbering over recreational" uses. Reply App. 1a-2a. The hearing transcript (at 16-17) amplifies Judge Graham's plain meaning reading of the broad Sixth Circuit precedents: the conclusions on structural "biases" affecting the Forest Service and its undervaluing of "the recreational value of wilderness" signify that the "decision of the Sixth Circuit completely undermines the entire forest plan" and "that the court of appeals has held that the forest service is incapable of conducting an unbiased and neutral evaluation of the various considerations necessary to prepare a forest plan." (Copies of the Sierra Club Mem. and transcript have been lodged with the Clerk of this Court.) As the foregoing illustrates, if the Court by-passes review, this would not bring the case "to a close as expeditiously as possible." Fed. Opp. 22. The transcript (at 18) also suggests that Judge Graham and the Sierra Club would defer district court proceedings if this Court grants the writ.

see Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 385-86, 395-97 (1926). Even if the Sierra Club had filed an "as-applied" challenge to a particular timber sale (which it did not), it could only obtain review of the portions of the forest plan that were applied in the concrete factual setting of that timber sale. *See* 28 F.3d at 759.

b. The Sierra Club (at 2-7, 15-21, 25-27) prematurely argues why it should win if review is granted, but provides no argument against granting the writ.

c. The Sierra Club (at 27-30) offers no coherent argument against review of the even-aged harvesting issue. The Sierra Club's views are that "Congress disfavors clearcutting" and that the "court below did express the view that the Forest Service had also violated the NFMA by the excessive use of clearcutting" on "80%" of harvested lands. Under these views, the court below did find that even-aged management cannot be the primary "rule" for forest management, and a circuit conflict exists on a significant issue for managing public lands. *See* pages 5-6, above.

The Sierra Club seems to argue the even-aged holding of the Court below was a minor one, and the more important holding was that primitive recreation must be preferred over timber production. We agree that the latter holding also has great significance for National Forest management (and it underlies the TRO against Wayne timber harvesting). Pet. 21-23. Neither set of Respondents has argued that this holding is not certworthy.

d. Though the Sierra Club asserts (at 20-21) that *Bennett v. Spear*, 117 S. Ct. 1154 (1997), affects its standing, there is a fundamental difference between the immediate change in the legal ability to take an endangered species found determinative in *Bennett* and the contingent possibility of injury at issue here. Pet. 20. When a plaintiff challenges

only a forest plan, no environmental injury would occur unless a future ground-disturbing action is taken after another decisionmaking process that is subject to judicial review. Pet. 4, 11.

Far more apt is *Raines v. Byrd*, 117 S. Ct. 2313 (1997), decided after the Petition had gone to the printers. The Court held in *Raines* that Article III jurisdiction was lacking on a facial challenge to the constitutionality of the Line Item Veto Act. The parallels to the facial challenge here are striking. In *Raines*, the Court held that a facial challenge to the Act could not be litigated "at this time and in this form" because there was no imminent personal injury-in-fact. 117 S. Ct. at 2315-16, 2320-22. Thus, the facial challenge form of Sierra Club's 1992 suit is suspect. Further, *Raines* reinforces that an "institutional injury" (there, the "diminution of legislative power") usually is "too abstract" to be "legally and judicially cognizable." *Id.* at 2317-18, 2320-22. The institutional or psychic injuries the Sierra Club asserts here (the forest plan causes injury by merely designating lands on paper as suitable for timber production without proposing or dictating a timber sale) are too abstract to satisfy Article III. *See* Sierra Club Opp. at 11, 17; Fed. Opp. at 3-6.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: Sept. 15, 1997

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Appendix

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE SIERRA CLUB, *et al.*, :

[Filed Sept. 5, 1997]

Plaintiffs, :

vs. : Civil Action No. C2-92-249

MIKE DOMBECK *et al.*, : JUDGE GRAHAM

Defendants. :

ORDER PROHIBITING TIMBERING OR BURNS IN THE BLUEGRASS RIDGE RESTORATION AND MARKIN FORK TIMBER PROJECTS

This matter came before the Court on the Motion of the plaintiffs for an order prohibiting the defendants from resuming or permitting the resumption of the activities associated with the Bluegrass Ridge Restoration and Markin Fork Timber Projects. Counsel for the parties appeared before the Court for an on-the-record hearing on the plaintiffs' request for a temporary restraining order. Counsel for intervenors appeared in person and counsel for the government-defendants appeared telephonically.

The Court, having reviewed the application of the plaintiffs with attached affidavits, along with the January 21, 1997 Opinion of the Sixth Circuit Court of Appeals in this matter, finds that the requested relief should be granted.

The Court finds that the plaintiffs will suffer irreparable injuries if these timber projects proceed as they will result in

the removal of trees in portions of the Forest by timbering or burning. Affidavits submitted by the plaintiffs demonstrate that these areas are used by members and officers of the plaintiff organizations. Once cutting is commenced, there would be no way to undo the effects of the timbering. The Court further finds, based upon the decision of the Court of Appeals in this matter, that there is a great probability that the plaintiffs will succeed in demonstrating that the timber projects which are the subject of this Motion are the product of an unlawful Forest Plan which arbitrarily favored timbering over recreational and other uses of the Forest. The Court further finds that there will be little or no injury to the defendants in this case as a result of the issuance of an order prohibiting any further implementation of these projects, especially in light of the fact that the Forest Service had previously, on its own initiative, stayed one of these projects following the issuance of the decision of the Court of Appeals in this matter.

For the above reasons, the defendants and their agents and all those acting in concert with them are hereby enjoined from taking any action to implement the Bluegrass Ridge Restoration Project and the Markin Fork Timber Project until further order of this Court. The defendants, their agents, and those acting in concert with them shall refrain from engaging in any timbering, thinning, and/or burning of trees in the respective project areas until further order of this Court.

This Order shall take effect upon the filing of the plaintiffs of a $1,000.00 bond.

IT IS SO ORDERED:

/s/ James L. Graham
JUDGE JAMES L. GRAHAM

No. 97-16

(6)

Supreme Court, U.S.
FILED
DEC 16 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

JOINT APPENDIX

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Petition for a Writ of Certiorari Filed July 1, 1997
Certiorari Granted October 20, 1997

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

30 pp

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Appendix B - District Court's Summary Judgment Opinion (March 11, 1994) 10a

Appendix C - District Court's Evidentiary Opinion (March 8, 1993) 49a

Appendix D - 1990 Administrative Appeal Decision . . 66a

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO (Columbus)

Civ. A. No. 92-CV-249

SIERRA CLUB
v.
ROBERTSON, ET AL.

RELEVANT DOCKET ENTRIES

No.	Date	Description
1	3/18/92	COMPLAINT (Summons issued) (referred to Mag. Judge Mark R. Abel) (no. pgs: 15) (tl) [Entry date 03/20/92]
6	7/30/92	MOTION of Ohio Forestry Association Inc for leave to intervene as a Defendant. (no pgs: 11 + exhibits) (aq) [Entry date 08/03/92]
14	9/3/92	NOTICE by defendant of filing the administrative appeal record and index to the planning records with attached Declarations of Barbara Timberlake and Robert Ballantyne. Six large binders and 1 folder of publications (located under the desk of Beverly in Clerks Ofc.) () (br)
15	9/4/92	ORDER by Mag. Judge Mark R. Abel granting motion to intervene by Ohio Forestry Association as a Defendant. [6-1] (cc: all counsel) (no pgs: 1) (br) [Entry date 09/08/92]

19	10/15/92	MOTION by defendant Ohio Forestry Assoc for order limiting the scope of review of the Adm. record () (br) [Entry date 10/16/92]
23	11/25/92	AMENDED COMPLAINT by plaintiff Sierra Club (no pgs: 17) (br) [Entry date 11/30/92]
31	3/8/93	ORDER by Judge James L. Graham granting motion for order limiting the scope of review of the Adm. record [19-1], and granting motion in limine to review the Adm. Record [18-1] (cc: all counsel) (no pgs: 21) (br)
34	6/22/93	MOTION by plaintiff Sierra Club to file a second amended complaint () (br) [Entry date 06/23/93]
36	7/23/93	ORDER by Mag. Judge Mark R. Abel granting motion to file a second amended complaint [34-1] (cc: all counsel) (no pgs: 1) (br) [Entry date 07/28/93]
38	8/11/93	MOTION by defendant F Dale Robertson, defendant Edward Madigan, defendant Floyd J Marita, defendant Francis J Voytas, defendant Ohio Forestry Assoc for summary judgment (no pgs: 3) (pl) [Entry date 08/12/93]
39	8/11/93	MEMORANDUM by defendant F Dale Robertson, defendant Edward Madigan, defendant Floyd J Marita, defendant Francis J Voytas, defendant Ohio Forestry Assoc in support of motion for summary judgment [38-1] (no pgs: 80 + exhibits) (pl) [Entry date 08/12/93]

41	8/11/93	Notice by plaintiff Sierra Club of filing supplementation of the administrative record (16 vol. in binder form in pockets located in Bev's cubicle) (br) [Entry date 08/16/93]
42	8/11/93	MOTION by plaintiff Sierra Club for summary judgment () (br) [Entry date 08/16/93]
45	8/19/93	REVISED MOTION by plaintiff Sierra Club for summary judgment () (br)
48	9/22/93	ORDER by Judge James L. Graham setting cross motions for summary judgment [45-1], [42-1], and [38-1] for oral hearing at 9:00 a.m. on 10/28/93 (cc: all counsel) (no pgs: 2) (br)
59	10/28/93	CIVIL MINUTES: Proceeding before Judge James L. Graham; In-court hearing was held on 10-28-93 on the cross motions for sj. A written order will issue as soon as possible. , (cc: all counsel) () (br)
60	3/11/93	ORDER by Judge James L.Graham denying plaintiff's motions for summary judgment [45-1] and [42-1], granting defendants' motion for summary judgment [38-1] dismissing case Judgment to enter for the defendants at plaintiffs costs. (cc: all counsel) (no pgs: 39) (br)
61	3/11/94	JUDGMENT ENTERED as to #60: (cc: all counsel) (no pgs: 1) (br)
62	4/8/94	NOTICE OF APPEAL by plaintiff Sierra Club from Dist. Court decision [61-1] of 3/11/94,

		and the Dist. Court decision [31-1] of 3/8/93 (no pgs: 2) (sm) [Entry date 04/11/94]
63	1/3/95	RULE 11(e) FILED: File to be retained by District Court during appeal. (sm)
--	1/9/95	RECORD CERTIFIED to USCA 6th: 3 volume of pleadings only (sm)
64	1/23/97	INFORMATION COPY of USCA 6th: appeal [62-1]: reverse and remanding to the district court (sm) [Entry date 01/27/97]
65	1/30/97	RENEWED MOTION by plaintiff for summary judgment () (br) [Entry date 01/31/97]
66	4/16/97	ORDER OF USCA 6th: reversing and remanding the Decision of the District Court Appeal [62-1] (no pgs: 1) (sm) [Entry date 04/17/97]
--	5/2/97	APPEAL Record Returned from USCA 6th. (sm)
--	7/28/97	RECEIPT OF SUPREME COURT OF THE US APPEAL NUMBER - Number Assigned: 97-16 (sm)
67	8/26/97	RENEWED MOTION by plaintiff for summary judgment (no pgs:) (wh) [Entry date 08/28/97]
68	9/5/97	NOTICE by plaintiff of substition of Mike Dombeck U.S. Secretary of Agriculture for F Dale Robertson (no pgs: 2) (wh)

69	9/5/97	MOTION by plaintiff for temporary restraining order (no pgs: 8) (wh)
70	9/5/97	CERTIFICATION of Notice by plaintiff to opposing counsel pursuant to Rule 65(b) (no pgs: 2) (wh)
71	9/5/97	AFFIDAVIT of Frederick M Gittes regarding motion for temporary restraining order [69-1] (no pgs: 5) (wh)
72	9/5/97	ORDER by Judge James L. Graham granting motion for temporary restraining order [69-1] by pltf. with the posting of the $1,000.00 bond. (cc: all counsel) (no pgs: 2) (br) [Entry date 09/09/97]
73	9/8/97	ORDER by Judge James L. Graham In-court hearing on the motion for pltf. for summary judgment is set at 1:00 on 1/12/98 (cc: all counsel) (no pgs: 2) (br) [Entry date 09/09/97]
--	9/9/97	TRANSCRIPT filed of the 9-5-97 proceedings (br)
74	9/10/97	LETTER to Clerk from the US Supreme Court re: ext of time for a petition for a writ of certiorari. (br)
--	10/9/97	TRANSCRIPT filed of the Sept 5, 1997 proceedings (br) [Entry date 10/16/97]
75	10/28/97	MOTION by defendant Ohio Forestry Assoc to vacate the order of 9-8-97 () (br) [Entry date 10/29/97]
76	10/27/97	ORDER OF SUPREME COURT OF THE UNITED STATES: the petition for a writ of

		certiorari is granted(no pgs:1) (sm) [Entry date 10/29/97]
77	10/29/97	ORDER by Judge James L. Graham granting the parties motion to vacate the order of 9-8-97 [75-1] vacating [73-1] the Scheduling order of 9-8-97 (cc: all counsel) () (br) [Entry date 10/30/97]
78	10/31/97	ORDER OF SUPREME COURT OF US: writ of certiorari is GRANTED (no pgs: 1) (sm)

General Docket
Sixth Circuit Court of Appeals

Court of Appeals Docket #: 94-3407

THE SIERRA CLUB; CITIZENS COUNCIL ON CONSERVATION AND ENVIRONMENTAL CONTROL

Plaintiffs - Appellants

v.

JACK WARD THOMAS, in his capacity as Chief of the United States Forest Service; MICHAEL ESPY, in his capacity as Secretary of Agriculture; FLOYD J. MARITA, in his capacity as Regional Forester, Eastern Region; EURIAL TURNER, in his capacity as Forest Supervisor, Wayne National Forest;

Defendants - Appellees

OHIO FORESTRY ASSOCIATION, INC.

Intervening Defendant - Appellee

RELEVANT DOCKET ENTRIES

Date	Description
4/18/94	Civil Case Docketed. Notice filed by Appellant Sierra Club, Appellant Citizens Cncl. Transcript needed: y (cf)
8/3/94	BRIEFING LETTER SENT brief returned to Frederick M. Gittes for Appellants Citizens Cncl, Sierra Club because of format (13 characters per inch; footnotes set in different font) [94-3407], resetting briefing schedule: appellant brief due

now 8/17/94; appellee brief now due 9/14/94; reply brief now due 9/28/94; appendix now due 10/5/94 [94-3407] (teb)

11/4/94 BRIEF filed by Frederick M. Gittes for Appellant Citizens Cncl, Appellant Sierra Club. Copies: 5. Certificate of service date 11/3/94 [94-3407] (vf)

11/15/94 BRIEFING LETTER SENT resetting briefing schedule: appellee brief now due 12/15/94; appendix now due 1/5/95 [94-3407] (mmd)

12/19/94 BRIEF filed by Elizabeth Ann Peterson for Appellee Eurial Turner, Appellee Floyd J. Marita, Appellee Michael Espy, Appellee Jack Ward Thomas. Copies: 5. Certificate of service date 12/15/94 [94-3407] (vf)

12/27/94 Appellee MOTION filed to adopt a brief previously filed by appellee, Espy, Marita and Turner. Motion filed by Stephen H. Dodd for Appellee Ohio Forestry Assoc. Certificate of serviced date 12/22/94. [94-3407] (mmd)

12/29/94 REPLY BRIEF filed by Frederick M. Gittes for Appellants Citizens Cncl, Sierra Club Copies: 5. Certificate of service date 12/28/94 [94-3407] (teb)

1/10/95 CERTIFIED RECORD filed: Volumes include 3 Pl (only). [94-3407] (tt)

1/19/95 APPENDIX filed by Frederick M. Gittes for Appellants. Copies: 5 (Vol. I - II). Certificate of service date 1/19/95 [94-3407- (vf)

9/1/95 ORDER filed directing the Department of Justice representing the United States Forest Service to file within ten day three copies of the Management Plan for the Wayne National Forest as finally approved. This should be contained in one complete document and should indicate that it was submitted in this form tot he district court. [1197170-1] [94-3407]. Entered by order of the court. (mmd)

9/18/95 Appellee MOTION filed for leave to file Management Plan out of time [1204339-1] Motion filed by Elizabeth Ann Peterson for Appellee Eurial Turner, Appellee Floyd J. Marita, appellee Michael Espy, Appellee Jack Ward Thomas [94-3407] (mmd)

9/22/95 RULING granting motion to file Management Plan out of time filed by Elizabeth Ann Peterson [94-3407] LG/mmd, per hearing panel on 9/21/95. (mmd)

10/12/95 CAUSED ARGUED on 10/12/95 by Frederick M. Gittes for Appellant Citizens Cncl, Appellant Sierra Club, Elizabeth Ann Peterson for Appellee Eurial Turner, Appellee Floyd J. Marita, Appellee Michael Espy, Appellee Jack Ward Thomas, James E. Melle for Appellee Ohio Forestry Assoc. before Judges Martin, Batchelder, Cool, [94-3407] (paw)

10/25/95 FILED: Proposed Land & Resource Management Plan for the Wayne National Forest and the Draft and Final Environmental Impact Statements for the Plan for Elizabeth Ann Peterson for Appellee

Eurial Turner, Appellee Floyd J. Marita, Appellee Michael Espy, Appellee Jack Ward Thomas [94-3407] (mmd)

1/21/97 OPINION filed: REVERSED and remanded [94-3407], decision for publication pursuant to local rule 24 [94-3407]. Boyce F. Martin, Authorizing Judge, Alice M. Batchelder, separate concurring opinion, Julian A. Cook, District Judge. (mmd)

1/21/97 JUDGMENT: REVERSED and remanded. (mmd)

3/4/97 PETITION for en banc rehearing filed by Thomas R. Lundquist and James E. Melle for Appellee Ohio Forestry Assoc. Certificate of service date 3/3/97. [94-3407] (blh)

3/7/97 ADDITIONAL PETITION for en banc rehearing filed by Elizabeth Ann Peterson for Appellees Jack Ward Thomas, Michael Espy, Floyd J. Marita, Eurial Turner. Certificate of service date 3/6/97. [94-3407] (blh)

4/7/97 ORDER filed denying petition for en banc rehearing [1481757-1] filed by Elizabeth Ann Peterson [94-3407], and a petition for en banc rehearing [1481044-1] filed by Thomas R. Lundquist and James E. Melle [94-3407]. Boyce F. Martin, Alice M. Batchelder, Circuit Judges; Julian A. Cook, District Judge. (blh)

4/15/97 MANDATE ISSUED with no cost taxed [94-3407] (vf)

4/25/97 CERTIFIED RECORD RETURNED to lower court at the end of appellate proceedings. [94-3407]. Volumes included: 3 Pl; (dac)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Sierra Club and Citizens Council on Conservation and Environmental Control, Plaintiffs,	:	[Dated June 22, 1993]
	:	Case No. C2-92-249
vs.	:	JUDGE GRAHAM
F. Dale Robertson, in his capacity as Chief of the United States Forest Service, Edward Madigan, in his capacity as the Secretary of Agriculture, Floyd J. Marita, in his capacity as Regional Forester, Eastern Region, and Francis J. Voytas, in his capacity as Forest Supervisor, Defendants.	:	MAGISTRATE JUDGE ABLE
	:	SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

JURISDICTION

1. The court has jurisdiction pursuant to 28 U.S.C. sections 1331 and 2201, this being an action to preserve and protect the resources and wildlife of the Wayne National Forest under the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976, Title 16 U.S.C. section 1600 et seq.; the Multiple-Use Sustained-Yield Act of 1960, Title 16 U.S.C. section 528 et seq.; the National Environmental Policy Act, particularly Title

42 U.S.C. section 4332 and the Administrative Procedure Act, Title 5 U.S.C. sections 553 and 701 et seq.

PARTIES

2. The plaintiff, the Sierra Club, is a non-profit public interest organization concerned with preserving the Wayne National Forest (hereinafter,"Forest" or "Wayne") while enhancing its recreational, wildlife and other values through proper planning and management. The plaintiff Sierra Club is organized under the laws of California and has its principal place of business in California. The Sierra Club has 619,419 members nationally and its Ohio chapter had 17,647 members as of June, 1991.

3. The plaintiff, Citizens Council on Conservation and Environmental Control, is a non-profit unincorporated association concerned with preserving the Wayne while enhancing its recreational, wildlife and other values through proper planning and management. The Council's membership resides in Athens County and Hocking County, Ohio.

4. Members of the plaintiffs, especially in Ohio, regularly visit the Wayne for recreational purposes including hiking, bird watching and camping. Members also visit the Forest for their avocational, occupational and professional interests including scientific and scholarly pursuits. Members visit portions of the Forest which under the current management plan for the Forest have been or will be subject to clearcutting or other forms of logging of trees as a result of the defendants' unlawful practices regarding below cost timber sales.

5. The plaintiffs and their members have an interest in the enforcement and administration of the above-named Acts that extends beyond the generalized interest that all members of the public have in enforcement of the law. Final administrative

actions of the Forest Service, taken in contravention of existing law, work a direct injury upon the plaintiffs and their members by allowing damaging illegal and inefficient use of natural resources in national forest areas. Such actions by the defendants result in direct and substantial injury to the plaintiffs and their members by reducing their enjoyment of, and ability to use, the Wayne.

6. Defendants F. Dale Robertson, Floyd J. Marita, Edward Madigan and Francis Voytas are sued in their official capacities. Defendant Marita is the Regional Forester for the Eastern Division of the Forest Service which includes the Forest. Defendant Marita issued the Record Decision approving the plan at issue in this case. Defendants Robertson and Madigan are the Chief of the United States Forest Service and the Secretary of Agriculture, respectively, who have responsibility for formulating and implementing Land and Resource Management Plans for the nation's national forests as well as ensuring that these plans and Forest Service actions comply with the law. Defendant Francis Voytas is the Forest Supervisor of the Wayne and has primary responsibility for implementing the plan, including the below-cost timber sales and clearcutting of old growth forest areas.

THE ADMINISTRATIVE APPEAL

7. On January 4, 1988, Defendant Marita issued a record decision adopting a ten year plan for the Forest as required by Title 16 U.S.C. Section 1600 et seq. The decision followed a planning process beginning in 1986 in which the plaintiff, through its Ohio Chapter, and other similarly interested parties submitted comments and proposals to the Forest Supervisor regarding the plan favored and eventually adopted by the defendants.

8. While minor adjustments in the plan were made in response to the comments of the plaintiff and others, the most serious objections raised during the planning process were disregarded and not adequately addressed in the final plan as adopted by defendant Marita in his decision of January 4, 1988.

9. The plan adopted by defendant Marita, as subsequently approved, controls all management and policy decisions for the Forest until a subsequent plan is approved as a matter of law. As a matter of practice the current plan will significantly and materially impact on future planning processes as a reference point for any future plans. The implementation of the plan will, of necessity, affect future options.

10. On February 16, 1988, the plaintiff Sierra Club appealed defendant Marita's decision, to defendant Robertson pursuant to the applicable regulations. On November 14, 1990, the appeal was denied and the plan affirmed. Defendant Robertson's decision became a final administrative decision of the Department of Agriculture when defendant Madigan elected not to review the matter within ten days of its receipt.

11. On February 18, 1988, plaintiff, the Citizen's Council, appealed defendant Marita's decision to defendant Robertson pursuant to the applicable regulations. On April 15, 1988, the Council submitted its statement of reasons in support of its appeal. Defendant Marita did not file the required responsive statement to the plaintiff Council's submission until May 4, 1989, over a year later. On May 27, 1989, the plaintiff Council filed its reply to defendant Marita's responsive statement. However, no decision was forthcoming.

12. On September 25, 1991, the plaintiff Council wrote the defendant demanding a decision. On November 12, 1991,

defendant Robertson, through his agent, responded that a decision could be expected within 45 days. On March 26, 1992, after the filing of this action, a decision denying plaintiff Council's appeal was served on the plaintiff.

FACTS

13. According to records of the Forest Service related to the plan, the Wayne National Forest unit includes within its boundaries 832,603 acres, but only 202,967 acres of the area is National Forest belonging to the federal government as the Forest unit boundaries contain land belonging to both the private and public sector of Ohio.

14. Located in the hill country of southeastern Ohio, the Wayne's lands are characterized by narrow ridge tops, steep slopes and narrow valleys. These characteristics make much of the Wayne physically and economically unsuitable for timbering, particularly clearcutting which involves cutting all saleable and unsaleable trees in large tracts within designated management areas of the Forest. These characteristics adversely affect the cost and difficulty of building the roads necessary for the cutting and removal of the trees as well as the degree of damage caused by erosion and water run-off associated with clearcutting and road construction in forests.

15. Public lands available for recreation comprise less than 4% of the State of Ohio. Although it is one of the smaller national forests in the country, the Wayne comprises 24% of the public land with wildlife value in this state.

16. The Wayne represents one of the few areas of relatively extensive, continuous forest growth in Ohio and contains a substantial portion of the old-growth forest in the state. The defendants' own studies indicate that there will be an overall

loss in forest wildlife habitat in the State as a whole in the future.

17. Under the forest plan adopted by the defendants, almost seventy per cent (70%) of the Wayne has been designated as suitable for timber production. The plan authorizes sale of 75 million board feet over the life of the plan with an annual allowable sale quantity of 7.5 million board feet.

18. The primary method under the plan for taking the forest's trees for sale is clearcutting, a method disfavored by law and regulation and subject to special requirements particularly when undertaken in connection with below cost timber sales. The plan reserves approximately 120,000 acres for so-called even-aged management, mostly clearcutting. Upon information and belief, this represents 80% of the timber base.

19. To facilitate the timber removal the plan allows annual construction of new permanent roads, reconstruction of existing road and construction of temporary roads.

20. Because of the extensive private and state holdings within the boundaries of the Wayne, there already exist approximately 300 miles of state, county and township roads within the Forest. In addition there are approximately 250-300 miles of mineral access roads along with 500 to 1,000 miles of **unsurfaced** roads. All of these roads are exclusive of roads built by the Forest Service. The defendants failed to adequately consider the extensive **roaded** areas on private and state lands which coexist with the Wayne. The defendants failed to adequately consider the cumulative environmental and visual impact of the planned new road construction.

21. The timber sales under the plan approved by the defendants are below cost sales. Taxpayers are subsidizing the

sale of timber from the Wayne to commercial interests because the defendants are unreasonably, unnecessarily and arbitrarily permitting excessive timbering of the Forest at a loss to the government.

22. In Fiscal Year 1987 total revenues for timber sales in the Wayne were $480,876 while expenses and payments to the states totaled $718,525. In that fiscal year revenues were approximately 67% of costs. In fiscal Year 1988, revenues were $858,017 while expenses and state payments were $1,192,850 meaning revenues were only 72% of costs that year. In fiscal year 1989 revenues were $838,366 while expenses and state payments were $1,074,113 meaning revenues were only 78% of costs that year. Similarly, in fiscal year 1990 revenues were $469,751 while expenses and state payments were $632,757 meaning revenues were 74% of costs.

23. Most of the land designated as suitable under the plan will continue to lose money in connection with timber sales. Furthermore, the forest service analysis of costs is inadequate and misleading for among other reasons, it does not account for the cost of building roads to access timber or administrative overhead, thereby underestimating the cost of the timber program.

24. When doing the economic suitability analysis, defendants violated section 6(k) of the NFMA. Contrary to the requirements of section 6(k), the defendants ignored relevant economic information, selected harvest levels first, and then excluded from the suitable timber base only those lands not needed to meet the predetermined harvest levels. As a result, harvest levels, not economic considerations, dictated the timber base, and economically unsuitable lands were included in the base.

25. The plan adopted by the defendants is unlawful and arbitrary and capricious because, among other reasons:

(a) the plan places the objective of timber harvesting above all other uses;

(b) the plan fails to meet the "suitability" requirement for timber harvest planning by designating economically and environmentally unsuitable lands for timbering;

(c) the plan lacks site-specific determinations that clearcutting is the "optimal" method of harvesting timber in the Wayne;

(d) the plan fails to demonstrate the **optimality** of clearcutting as the method of harvesting timber for the Wayne as a whole;

(e) the plan fails to demonstrate that timber harvest will be cost effective and omits any site specific analysis to determine cost effectiveness;

(f) the plan fails to demonstrate that the non-timber use benefits alleged to be achieved through the timber program are really needed.

26. The defendants, arbitrarily and unlawfully, attempted in the plan to justify below cost timber sales by assigning a positive economic value to certain alleged non-economic intangible benefits, particularly wildlife diversity, purportedly associated with the timbering allowed by the plan.

27. The defendants represent in the plan that the timber harvest will benefit wildlife diversity by increasing the early successional habitat (characterized by younger growth, more open uncanopied areas and edging) within the federally owned portions of the Wayne. This, according to the plan, will promote certain types of wildlife associated with early successional habitats.

28. The defendants arbitrarily and unlawfully disregarded the conditions surrounding the federal holdings in the Wayne which were disclosed in the planning documents as well as the administrative process.

29. Currently, mature, old growth forest with continuous **unopen** canopy is in short supply in Southeastern Ohio and the rest of the state. The maturing, natural forest areas in the Wayne provide much needed habitat for numerous plant and animal species requiring late successional conditions.

30. There is already an ample supply of early successional habitat in the area of and around the Wayne. Wildlife that requires early successional conditions are overly abundant in the region, a case in point being the white tailed deer. The defendants' planning documents disclose that much of the non-federal land in the area is habitat similar to early successional, whereas 170,220 acres of federal lands are in forest (at various stages of maturity). 77% of the federal lands in the Wayne would have to be deforested to achieve the same amount of open habitat that already exists in the surrounding area.

31. The defendants' failure to properly consider the lands surrounding the Wayne in assigning positive economic values to intangible benefits purportedly to be gained from clearcutting was arbitrary and a major plan defect. The planning deficiency was worsened by the absence of any data derived from study of the Wayne itself pertaining to wildlife and recreation values.

32. The estimated values in the planning documents relating to wildlife and recreation used to justify below-cost sales were not adjusted for local recreational conditions on the Wayne. Instead, values applicable to the 20-state Eastern Region of the Forest Service were used. The Eastern Region stretches from

the Maine Woods to the Ozarks, from the Boundary waters to the Chesapeake Bay. An index of demands for the Region as a whole cannot accurately reflect the local circumstances surrounding the Wayne.

33. Aside from arbitrarily and capriciously assigning positive economic values to the effects of timbering on biological diversity and recreation, the defendants failed to adequately consider or value the detrimental effects of the below-cost timber sales on these and other uses of the Forest which by law are to be given equal weight with timber production.

34. The defendants' plan will actually reduce wildlife diversity by allowing timbering, particularly clearcutting, to disrupt, reduce and fragment the late successional, old growth forest available in Ohio while adding to the overabundance of early successional habitat in the Wayne area.

35. The defendants' plan will actually reduce recreational opportunities in the Wayne. Currently, the Wayne only meets 40% of the demand for primitive forest. The plan adopted by the defendants will reduce the availability of primitive forest.

36. The defendants' plan also arbitrarily assigns positive values for alleged benefits to the local economy from below-cost timber sales. In fact, the plans for below-cost timber sales are detrimental to the local economy which increasingly benefits from tourism associated with the Wayne. The Wayne constitutes a unique recreational opportunity for Ohio and it is ideally located for access by those living in Ohio's major urban areas.

37. In Southeast Ohio the use of land for urban and agricultural purposes has been accompanied by exploitation for purposes of mineral extraction and timbering. Large sections

of land have been devoted to strip mining; oil and gas development has also expanded greatly in the past decade. Timber production has occurred on both public and private lands. Despite liberal use of the land in Southeast Ohio for these primary industries, the regional economy is among the worst in the State. Extraction and exploitation have not proven to be reliable sources of stable income or employment. Yet, in disregard of these facts, the defendants justify the below cost sale of timber, in part, as purportedly necessary for the local economy. The defendants know or should know that preservation of the timber base by limiting below cost timbering will better serve the local economy. The unique recreational opportunities offered by the wayne's mature old growth forest will provide greater economic benefits to the local community.

38. The mineral exploitation in the area of the Wayne has already severely and adversely affected the water supply in the region. The clearcutting under the plan and associated road building will cause increased water run-off during periods of heavy rains and result in increased sedimentation adversely affecting the watershed. The plan and its associated environmental impact study do not contain sufficient data or analysis concerning the plans' impact on water resources. Watershed protection is lacking in the plan as is sufficient discussion of whether there is any current technology which can mitigate the plans' effect on water resources.

39. The plan fails to contain adequate analysis and/or data concerning sewage and other waste associated with proposed developed and recreation sites.

40. The plan fails to consider the impact of mineral and oil extraction activity and recent court decisions affecting these activities, on the forest and suitable timber base. The plan and

its environmental impact statement fails even to assess the cumulative impact of the extensive coal mining, particularly strip mining, which has been permitted in and around the Wayne for many years.

41. The forest service used a computer program known as FORPLAN to develop the plan for the Wayne.

42. The manner in which the forest service utilized FORPLAN was arbitrary and capricious.

43. The FORPLAN program which the forest service used to develop the plan for the Wayne included numerous false and unjustified assumptions which arbitrarily biased the plan in favor of timbering. These assumptions include but are not limited to the assumption that recreation can only occur when timbering occurs.

44. Such analysis as exists in the plan for estimating demand for uses of the forest is arbitrary and unreasonable.

45. The plan and associated Environmental Impact Statements fail to adequately document the demands for resources and uses upon which the plan is premised.

46. The plan fails to disclose widely held scientific beliefs and/or results of significant scientific research contrary to the assumptions and premises upon which the plan was based.

47. Under NFMA, see 36 C.F.R. §219.12(f), and NEPA, 40 C.F.R. §1502.14, a reasonable and broad set of alternatives are required to be considered a part of the planning process. The defendants failed to present a reasonable and broad set of alternatives.

FIRST CLAIM FOR RELIEF

48. Paragraphs one through forty-seven are realleged and incorporated herein.

49. The actions of the defendants in approving the plan for the Wayne and in directing or permitting below-cost timber sales accomplished by means of clearcutting are in violation of the provisions of federal law enumerated in paragraph one of this complaint. The actions of the defendants threaten imminent and irreparable harm to plaintiff's interests in the use and enjoyment of national and wilderness resources and plaintiff's interests can only be protected by a declaration that the existing plan for the Wayne is inconsistent with law accompanied by an injunction prohibiting further timber sales and clearcutting until the plan and its environmental impact statement are revised, subject to public and administrative review, to bring them into conformity with law.

SECOND CLAIM FOR RELIEF

50. Paragraphs one through forty-seven realleged and incorporated herein.

51. All of the public lands held by the federal government, including the national forests, are held in trust for the people of the United States. This trust responsibility extends to agencies which administer federal governmental policies and programs concerning such public lands.

52. The defendants' actions in directing or permitting below-cost timber sales in the Wayne under the plan violate the defendants' duties as public trustees.

THIRD CLAIM FOR RELIEF

53. Paragraphs one through forty-seven are realleged and incorporated herein.

54. The planning regulations, 36 C.F.R. section 219.14 (1991), provide for a three-level suitability analysis. Stage I provides for the removal of lands from the base prior to the selection harvest levels based on physical characteristics, but it does not include consideration of economic factors.

55. Stage II (section 219.14(b)) requires an analysis of the financial costs and returns of lands with similar characteristics. The regulation requires a comparison of the direct costs of harvesting timber with the direct benefits. This exercise, however, does not result in any lands being designated as not suited for timber production, regardless of how much money those lands would lose on timber production.

56. Under Stage III (section 219.14(c)), the objectives, including the harvest level, of the planning alternatives are selected. Only land that is not needed to meet the harvest level objective is then classified as not suitable. Planning alternatives with higher levels demand larger suitable timber bases.

57. Most of the land on the Wayne will continue to lose money under the foreseeable future in conditions. Following the regulations, the defendants did not remove economically unsuitable lands from the timber base using this information.

58. Under Stage III, the defendants developed forest management alternatives selecting harvest levels without regard to the economics of the land on the Wayne. Following the regulations, the Forest Service designated as not suitable for

timber production only land that was not needed to meet the harvest level.

59. Section 6(k) of the NFMA requires the identification of lands economically not suited for timber production. This identification must be based on an objective standard or rule of reason that eliminates uneconomic lands from the timber base independent of timber harvest levels. Contrary to section 6(k), the suitability regulations do not provide an objective standard or rule of reason for identifying economically unsuitable lands independent of, and prior to, the selection of harvest levels. As a result, the regulations allow harvest levels rather than economic considerations to dictate the suitable timber base.

60. Therefore, the NFMA suitability regulations, 36 C.F.R. section 219. (1991), violate section 6(k) of the NFMA and are arbitrary, capricious, an abuse of discretion, and not in accordance with law, as set forth in the APA, 5 U.S.C. section 706(2).

WHEREFORE, the plaintiff requests:

a) that the Court declare that the plan adopted by the defendants is unlawful as are the below-cost timber sales and timbering, including clearcutting, authorized by the plan; and

b) that the Court issue a preliminary and permanent injunction prohibiting the defendants from permitting or directing further timber harvest and/or below-cost timber sales until the plan has been revised in accordance with law, subject to public and administrative review; and

c) that the plaintiff recover from the defendants its costs, including reasonable attorneys fees, as provided for under the Equal Access to Justice Act, Title 28 U.S.C. section 2412(D) and any other applicable law; and

d) that the Court order such other further relief as may be appropriate.

Respectfully submitted,

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No. 97-16

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether Respondents' challenge to the Wayne National Forest Land and Resource Management Plan, developed by the United States Forest Service in accordance with the National Forest Management Act of 1976, presents a justiciable controversy?

2. Whether the Forest Service is, by virtue of the statutes under which it operates, institutionally biased in favor of timber production in a judicially remediable way?

3. Whether the Sixth Circuit erred in holding that the Wayne Forest Plan was inconsistent with applicable legal requirements?

PARTIES TO THE PROCEEDINGS

Petitioner Ohio Forestry Association, Inc. was an appellee before the court of appeals and an intervening defendant at the district court level. The Chief of the United States Forest Service within the Department of Agriculture (then Jack Ward Thomas and currently Mike Dombeck) was the lead appellee before the court of appeals and lead defendant at the district court level. The other named defendant-appellees are Department of Agriculture officials: the Secretary of Agriculture (then Mike Espy and now Dan Glickman), the Regional Forester for the Eastern Region (then Floyd J. Marita and now Robert T. Jacobs), and the Forest Supervisor for the Wayne National Forest (then Eurial E. Turner and now Jose A. Zambrana). The Sierra Club and the Citizens Council on Conservation and Environmental Control were the appellants before the court of appeals and plaintiffs in the district court.

The names of the current federal officials have been substituted pursuant to Rule 33. Pursuant to Rule 29.6, Petitioner states that the Ohio Forestry Association, Inc. has no parent or subsidiary corporations.

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OPINIONS BELOW

The January 21, 1997 opinion of the United States Court of Appeals for the Sixth Circuit reversing the grant of summary judgment to the government (Pet. App. A, 1a-9a) is reported at 105 F.3d 248. The April 7, 1997 order of the Sixth Circuit, denying rehearing and rehearing *en banc* (Pet. App. F, 131a-32a), is unreported. The March 11, 1994 opinion of the district court granting summary judgment in favor of defendants (Pet. App. B, 10a-48a) is reported at 845 F. Supp. 485. The district court's opinion excluding evidence going beyond the administrative record (Pet. App. C, 49a-65a) is unreported. The 1990 and 1992 administrative appeal decisions affirming the legality of the Land and Resource Management Plan - Wayne National Forest (Pet. Apps. D and E, 66a-130a) are unreported.

JURISDICTION

The court of appeals entered its opinion and judgment on January 21, 1997. Petitioner sought rehearing and rehearing *en banc* on March 3, 1997, which was denied on April 7, 1997. The petition for a writ of certiorari was filed on July 1, 1997 and was granted on October 20, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of the United States Constitution, and of the National Forest Management Act and other National Forest System laws, are reprinted in Pet. App. H, 146a-64a.

STATEMENT OF THE CASE

This case raises questions concerning the justiciability of a facial challenge to a forest plan. If jurisdiction exists, this case presents merits issues with respect to the Forest Service's management of the national forests and the limited role of the federal courts in overseeing that management.

The National Forest System and Forest Plans

1. The National Forest System comprises more than 191 million acres of federal lands. *See* 16 U.S.C. § 1609; 36 C.F.R. § 200.2 to .3; 58 Fed. Reg. 19369 (April 14, 1993). The System is managed by the United States Forest Service, an agency within the Department of Agriculture. Section 475 of Title 16 provides that: "No national forest shall be established, except . . . for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."

The Multiple-Use Sustained-Yield Act of 1960 ("MUSYA") broadened the permissible uses of national forests. It states the "policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Id.* § 528. The new multiple uses, however, were *not* to be administered "in derogation of" the water flows and timber supply purposes expressed in "section 475." *Id.*; *see United States v. New Mexico*, 438 U.S. 696, 707-15 (1978).

MUSYA directs the Secretary of Agriculture to "develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom." 16 U.S.C. § 529. Both "sustained yield" and "multiple use" are defined terms. *Id.* § 531. "Multiple use" requires, *inter alia*, that the Secretary manage forest resources "in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources." *Id.* § 531(a). "Sustained yield" refers to "achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the

national forests without impairment of the productivity of the land." *Id.* § 531(b).

2. The Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976 ("NFMA"), requires a "land and resource management plan" ("forest plan") for each national forest or group of national forests. 16 U.S.C. § 1604(a). A forest plan must "provide for multiple use and sustained yield of the products" from the national forest "in accordance with the Multiple-Use Sustained-Yield Act." *Id.* § 1604(e)(1).

The NFMA requires the Forest Service to adopt "regulations" that "specify[] guidelines for land management plans." *Id.* § 1604(g)(3). The court below suggested inconsistencies between the Wayne Forest Plan and § 1604(g)(3)(F)(v). This clause requires that the *regulations* contain a guideline to ensure that "clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an even-aged stand of timber" will be used only where the "cuts are carried out in a manner consistent with the protection of . . . recreation" and other resources. The court below did not cite the regulations that satisfy this mandate.

3. NFMA forest planning regulations are set forth in 36 C.F.R. Part 219. In general, before a forest plan is adopted, demand for the various resources is assessed, public comments are solicited on a draft plan, and draft and final environmental impact statements ("EISs") describing alternative plans are prepared under the National Environmental Policy Act of 1969 ("NEPA"). 36 C.F.R. § 219.12.

A forest plan provides long-term planning direction. It can remain in effect for up to 15 years, after which it is replaced by a "revised" plan. 16 U.S.C. § 1604(f)(5); 36 C.F.R.

§ 219.10(g). Most first generation NFMA forest plans were adopted between 1982 and 1988. Some 81 revised forest plans are scheduled for release over the next five years. A forest plan may, however, be "amended" at any time. 16 U.S.C. § 1604(f)(4); 36 C.F.R. § 219.10(e).

4. Forest plans and their accompanying EISs typically do not authorize or direct specific ground-disturbing projects or actions. Before any site-specific activity (such as a timber sale) is implemented, the particular activity must first be proposed, analyzed by the Forest Service under NEPA and the NFMA, and formally approved by the agency; if the ground-disturbing activity is approved, it would be subject to judicial review. The Eighth Circuit has summarized the relationship between a forest plan and a site-specific project:

> A forest plan . . . is a general planning tool. It provides guidelines and approved methods by which forest management decisions are to be made for a period of ten to fifteen years. Adoption of the Plan does not effectuate any on-the-ground environmental changes. Nor does it dictate that any particular site-specific action causing environmental injury must occur. Indeed, before an environmental change can come about, several events must transpire. First, a site-specific action (e.g., a timber sale) must be proposed and found to be consistent with the Plan. Next, the action is subject to NEPA and NFMA analysis and public comment. Finally, the Forest Service must adopt the action. Finding an environmental injury based on the Plan alone, without reference to a particular site-specific action, would "take[] us into the area of speculation and conjecture."

Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)).

In its decisions on the Sierra Club's administrative appeals of the Wayne Forest Plan, the Forest Service described the Plan in similar terms: It "establishes a broad programmatic management system," but "specific projects will be proposed and evaluated [later] before final decisions are made."[1]

5. The Forest Service followed the planning approach described above for the then-177,701 acre Wayne National Forest in southern Ohio. *See* Pet. App. 12a-13a, 18a; Fed. Opp. at 5-8. The draft and final EISs analyzed seven alternatives, including alternatives that emphasized primitive recreation and de-emphasized timber production. The final Plan was adopted in January 1988.[2] The Plan contemplates the mix of multiple uses that the Forest Service viewed as providing the greatest net public benefits as follows:

> a. A forest plan assigns land to specific management areas ("MAs"). Each MA promotes a particular set of multiple uses. The plan provides minimum management

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[1] Pet. App. 75a, 87a-88a. *See also* Fed. Opp. at 2-7; Michael J. Gippert and Vincent L. DeWitte, *The Nature Of Land And Resource Management Planning Under The National Forest Management Act*, 3 ENVTL. LAWYER 149, 155-59, 166-69 (Sept. 1996); 60 Fed. Reg. 18886, 18897, 18923 (April 13, 1995) and 56 Fed. Reg. 6508, 6513, 6516, 6518-19, 6530-31 (Feb. 15, 1991) (describing current and proposed planning regulations); Pet. App. 18a.

[2] The Solicitor General has lodged copies of the Land and Resource Management Plan - Wayne National Forest ("Wayne Forest Plan" or "Plan"), Draft EIS ("DEIS"), Final EIS ("FEIS") and Record of Decision with the Clerk of this Court. We will cite to these documents by name. The Joint Appendix ("JA") provides the current Second Amended Complaint ("Complaint"), while the other pertinent materials are found in the Pet. App.

prescriptions for the uses identified for each MA. 36 C.F.R. § 219.11(c).

The Wayne Forest Plan contemplates natural and semiprimitive recreation on over half of the Forest. *See* Plan at 4-63 to 181. For example, MA 2.1 protects areas adjoining fishing and canoeing streams, MA 2.2 provides uneven-aged habitats for hiking and wildlife viewing, MAs 6.1 to 6.3 promote semiprimitive recreation, and MA 8.1 protects unique ecosystems. These MAs comprise 42,201 acres. Natural, nonmotorized recreation is contemplated for the 57,736 acre MA 3.3 as well. The Record of Decision (at 28-29) reflects that the Forest Service ultimately selected a Plan that contemplated more semiprimitive recreation and uneven-aged timber management than alternative plans with higher economic benefits.

b. A forest plan must also "identify lands . . . not suited to timber production." 16 U.S.C. § 1604(k); *see* 36 C.F.R. § 219.14. A forest plan therefore typically categorizes lands found both unsuitable and suitable for commercial timber production. The Wayne Forest Plan (at 4-7) categorized 126,107 acres as potentially "suitable." This categorization does not signify that timber sales will be approved on even a large portion of those lands. Rather, the Plan (at 4-180) predicted that 7,835 acres (6.2% of suitable timber lands, and 4.4% of the entire national forest) would be harvested in the first decade. Even less acreage was in fact harvested over the past decade.

c. A forest plan also describes "probable methods of timber harvest." 16 U.S.C. § 1604(f)(2). The Wayne Plan (at 3-5 and 4-180) anticipated that, from 1986 to 1996, 80% of timber harvesting would be conducted by even-aged methods and 5,075 acres of such cuts would occur. Again, the record

failed to match the Plan's predictions. Only 1,540 acres were harvested by even-aged methods over the period 1988 to 1996. Fed. Opp. at 17.

Administrative and Judicial Review of the Plan

6. In 1988, the Sierra Club and the Citizens Council on Conservation and Environmental Control ("Sierra Club" or "Respondents") filed administrative appeals challenging the Forest Plan. The Plan was affirmed in 1990 and 1992 decisions. Pet. App. 66a-130a. The agency appeal decisions repeatedly noted that, while the Sierra Club had purported to challenge the Plan, its claims were more properly directed to particular project-level decisions that would be made later over the Plan's 10 to 15 year life, would take into account site-specific concerns, and could be challenged at that time. "That a Forest Plan allows decisions to be made to implement projects does not mean that all possible projects consistent with the Forest Plan will go forward. In affirming the Regional Forester's approval of the Forest Plan we do not make any judgment on individual project decisions." Pet. App. 80a; *see id.* at 70a, 75a-88a, 94a, 98a-99a, 106a-107a.

7. On March 18, 1992, the Sierra Club brought this action. The Complaint takes the form of a broad and generalized attack on the Forest Plan and the final EIS. The Complaint states that the challenged agency action is the action of the Forest Service "approving the plan." JA 24. The Plan is alleged to cause "injury . . . by allowing damaging illegal and inefficient use of natural resources." JA 14. The Complaint requests broad relief against the implementation of the Plan, asserting that the court should declare that the entire "plan adopted by the defendants is unlawful" and enjoin "further timber harvest and/or below-cost timber sales until the plan has been revised." JA 24, 26.

The case was heard by District Judge James L. Graham of the United States District Court for the Southern District of Ohio. Judge Graham dismissed the Sierra Club's claims on the merits in a 39-page summary judgment opinion dated March 11, 1994. Pet. App. 10a-48a.

8. The Sierra Club appealed. The appeal was briefed and argued in the 1994-95 time period. The panel finally issued its brief, but broadly-worded, opinion in January 1997. *Id.* at 1a-9a. Chief Judge Martin's opinion rejected the Department of Justice's position that this facial challenge to a forest plan does not create a justiciable controversy. *Id.* at 3a-4a.

After finding the claims justiciable, the Sixth Circuit issued several unusual rulings on the merits. *Id.* at 5a-8a.

a. The panel majority developed the view that the Forest Service is institutionally biased in favor of timber production. *Id.* at 7a-8a. Judge Batchelder wrote separately because she did "not believe that the majority's undocumented broadside against the Forest Service is appropriate." *Id.* at 9a.

b. The court declared that the NFMA creates a strong "protective spirit" for the "recreational value of wilderness" and that the Plan is "in excess of the statutory limitations provided in § 1604(g)(3)(F)(v)." *Id.* at 6a, 8a. The panel seemed to conclude that the NFMA requires the preservation of primitive recreation first and permits timber harvesting -- or perhaps, even-aged cutting -- only as a secondary matter.

c. The panel interpreted 16 U.S.C. § 1604(g)(3)(F)(v) to limit use of "even-aged management" to "exceptional circumstances." *Id.* at 6a.

On October 20, 1997, this Court granted certiorari based on a Petition that raised both justiciability and merits issues.

SUMMARY OF ARGUMENT

Facial attacks on forest plans are not justiciable where, as here, they are based on allegations of environmental injury contingent on the later approval of some specific and separately challengeable ground-disturbing activity (such as a timber sale). The challenged action (the existence of a long-term planning document) did not cause any "imminent" and "certainly impending" environmental injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564-65 & n.2 (1992). Respondents' claim of a "future injury contingent" on a later timber sale action does "not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Article III and prudential ripeness principles limit the context, scope, and timing of judicial review to manageable case-by-case inquiries. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990); *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967). These principles restrict Respondents to contesting a particular timber sale that causes imminent environmental injury. There, judicial review can encompass any portions of the Forest Plan relied upon or applied in a particular timber sale decision.

If jurisdiction exists, the Sixth Circuit erred on three merits issues. First, the panel's view that statutes render the Forest Service institutionally "biased" reflects a basic misunderstanding of the limits of judicial review under the Administrative Procedure Act and undermines the presumptive respect that the judiciary must afford to decisions of administrative agencies.

The Sixth Circuit erred in its interpretations of the National Forest Management Act. It wrongly held that the Forest Service must prefer primitive recreation over timber

production and that the NFMA imposes a stringent duty of recreation "protection." *See United States v. New Mexico*, 438 U.S. 696 (1978). The court also erred in holding that 16 U.S.C. § 1604(g)(3)(F)(v) limits even-aged management to "exceptional circumstances." These holdings are unsupported by the statutory text and are contrary to the agency's interpretation. *See Sierra Club v. Espy*, 38 F.3d 792, 799-802 (5th Cir. 1994).

I. The Plan-Level Challenge Based On Alleged Environmental Injuries From Later And Separately Challengeable Timber Sales Is Not Justiciable

Respondents' effort to mount a generalized facial challenge to the Wayne Forest Plan does not present a justiciable controversy. Two aspects of justiciability are at issue: (1) Article III limits on jurisdiction to "cases or controversies," usually discussed under the heading of *constitutional standing*; and (2) limits on manageable controversies, usually discussed in *prudential ripeness* terms. The circuit courts have split 3-to-2 on the justiciability of such plan-level challenges.[3]

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[3] The Eighth Circuit found Article III *standing* absent in *Sierra Club v. Robertson*, 28 F.3d 753, 757-60 (8th Cir. 1994). The Eleventh Circuit found that Article III and prudential *ripeness* barred a plan-level challenge in *Wilderness Soc'y v. Alcock*, 83 F.3d 386 (11th Cir. 1996). The Sixth Circuit (in this case) and Seventh and Ninth Circuits have found that comparable plan-level challenges do create justiciable controversies, though they disagreed on the theory supporting that conclusion. *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995); *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992), and its progeny (e.g., *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1302-04 (9th Cir. 1993)).

A. Respondents Lack Constitutional Standing To Mount A Facial Challenge To The Wayne Forest Plan

"'To meet the standing requirements of Article III, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Federal courts must presume that they lack Article III jurisdiction until a plaintiff proves otherwise. *FW/PBS v. City of Dallas*, 493 U.S. 215, 231 (1990).

1. The Complaint's primary standing theory rests on the allegation that Respondents' members visit portions of the national forest that are potentially "subject to" logging under the Plan. Because the Plan does not approve or require timber harvesting in any given area, Respondents' claim is that its members will suffer environmental injury *if and when* a timber sale is approved in an area that is part of the large universe of areas the Plan preliminarily identifies for possible harvesting. *See* JA 13-14, 24. Respondents maintain that the injury that would follow if the agency decides to harvest on land the Plan classified as suitable for harvest should be sufficient to provide standing for a broad-based facial attack on the premises and the reasoning of the Plan itself. *See* Sierra Club Cert. Opp. at 20 (the "forest plan may be . . . one or two steps up the chain of causation from the final event that injures the plaintiff").

This Court has long held, however, that a "future injury contingent" on a later action -- here, the approval of a particular timber sale affecting a specific parcel of land, following a site-specific decisionmaking process in which a range of issues pertinent to the site and the method of harvesting may be considered -- does "not satisfy the

requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

To have standing, a plaintiff must be "immediately in danger of sustaining some direct injury as a result of the challenged" action. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). The injury must be both temporally "*imminent*" and "*certainly* impending." *Defenders of Wildlife*, 504 U.S. at 564-65 & n.2 (1992). The challenged Forest Plan, by itself, causes no environmental injury to the Sierra Club's members. "Adoption of the Plan does not effectuate any on-the-ground environmental changes." *Sierra Club v. Robertson*, 28 F.3d at 758; *see* pages 4-5, above.

To the contrary, the Plan's designation of suitable timber lands means only that lands are within a large pool of lands available for later timber sale proposals. A site-specific action involving the possible sale of timber must be specifically proposed and subjected to both NFMA and NEPA review, including public comment. At that stage, a range of issues particular to the specific site would have to be addressed and reconciled with the guidance provided by the Plan.

The mere designation of land as "suitable" does not mean that it *will* be harvested, nor does it prescribe *when* it will be harvested. A forest plan speaks in terms of a total "allowable [timber] sale quantity" or ASQ. 36 C.F.R. § 219.16. It does not direct that specific tracts be harvested at any particular time. Only a small percentage of suitable timber lands is "planned" to be harvested during the 15-year life of a plan and even this timber may not actually be harvested. *See* pages 6-7, above.

Moreover, the timber sale *volume* (the ASQ) contemplated by a forest plan may not take place for reasons such as budget

cuts, plan amendments, litigation, and the Forest Service's desire to avoid controversy. *See* 36 C.F.R. § 219.10(e) and (f); 60 Fed. Reg. 18886, 18901, 18905-07 (April 13, 1995) (describing how forest plans often are not fully implemented). For example, Respondents halted two even-aged timber sales through their administrative appeals.[4]

Even more attenuated is Respondents' objection to the Plan on a theory that it relies too heavily on harvesting by even-aged methods. References to clearcutting (or other even-aged management) in the Wayne Plan, or any other plan, set forth guidance on the use of the harvesting method. After the Plan, the question still remains whether an even-aged method will be allowed at a given site, and, if so, subject to what conditions designed to mitigate the method's effects. *See* pages 47-48, below. The Plan "narrows the scope of future environmental analyses, but an environmental analysis will be completed for each project which will focus on site-specific issues, alternatives and environmental consequences unique to the project." Pet. App. 25a. As the agency itself described it:

> The optimality determination [related to the decision whether to allow clearcutting in connection with a specific sale of timber] in the Wayne Forest Plan is appropriate as programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain areas of the forest to achieve specific management objectives. However the analysis and final decision on the appropriateness of

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[4] *See* Fed. Opp. at 16 n.11. Though the 1986 Wayne Forest Plan included 126,107 acres in the suitable land base, timber harvesting was predicted to occur on only 7,835 acres for the first decade. Plan at 4-180. In 1988-1996, only 3,381 acres were harvested. *See* Summary Of Harvest On Wayne NF From Stars Database (lodged by the government with the Clerk of this Court).

> even-aged management, or the optimality of clearcutting, must be made as a site-specific determination at the project level during Forest Plan implementation and must follow National Environmental Policy Act procedures.

Pet. App. 76a. Any objection that Respondents may have to clearcutting at a particular site may be addressed in the future by a decision not to employ that method at the site, by a decision to impose conditions on the use of the method that would vitiate any claimed injury at the site, or by a decision not to proceed with the sale at all. Therefore, any "injury" to Respondents is contingent on a range of Forest Service decisions that would be made at the project level.

Thus, a plan's inclusion of lands on the list of suitable lands, or its identification of a specific percentage of timber volume that may be harvested through even-aged methods, or even the adoption of a partial framework (establishing a valuation methodology for recreation or timber, to be used in making specific decisions at some later time) does not cause a sufficiently imminent injury to create standing for Respondents. *Accord Sierra Club v. Robertson*, 28 F.3d at 758-60. Notwithstanding the guidelines of the Plan, it remains unclear whether any particular parcel that might affect Respondents will be harvested, let alone harvested in a particular manner. Determinations about specific parcels will be made later, subject to a number of further decisions and decisionmaking criteria. Standing is lacking on a planning decision that merely means "proceed to the next step." *State of Nevada v. Burford*, 918 F.2d 854, 857 (9th Cir. 1990).

On the flip side, no decision by a federal court overturning the Forest Service's designations of land as suitable, or opining whether clearcutting should be allowed in some general sense, will provide the Sierra Club with any form of concrete redress.

A decision that too much land has been designated as suitable would not provide any assurance that any particular area will be switched from the suitable to the unsuitable class, let alone that it would then be preserved for primitive recreation. Indeed, timber sales for salvage and wildlife improvement purposes can still be held on *unsuitable* lands, thereby causing the same environmental injury. 16 U.S.C. § 1604(k); 36 C.F.R. § 219.27(c)(1). And, the Forest Service can reverse an unsuitability designation at any time and "return these lands to timber production." 16 U.S.C. § 1604(k). Moreover, a change in the percentage of timber that the agency anticipates being cut by even-aged methods would not determine whether any particular tract would, or would not, be harvested in that manner. Not only is a personal environmental injury absent in a plan-level challenge, but the "links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing." *Allen v. Wright*, 468 U.S. at 759.

2. Contrary to the Sierra Club Opp. (at 19-21), standing is not conferred by *Bennett v. Spear*, 117 S. Ct. 1154 (1997). In *Bennett*, the Court found that, due to the "modest" showings needed to survive a motion to dismiss, the *Bennett* plaintiffs were not disqualified from trying to prove standing to challenge a U.S. Fish and Wildlife Service biological opinion that effectively dictated reservoir management by the Bureau of Reclamation. *Id.* at 1163-65. Plaintiffs had challenged the restrictions on the reservoir's operating regime contained in the opinion's incidental take statement, which provided an immediately effective "permit authorizing the action agency to 'take' the endangered species." *Id.* at 1159, 1164-65. In contrast, any specific ground-level effect from the Plan is here contingent on another decision by the same agency (the Forest Service) to proceed with a particular timber sale.

A decision to hold a timber sale will consider site-specific factors *not* already considered in the Plan. This contrasts with the "virtually determinative" nature of an incidental take statement at issue in *Bennett*. A take statement is "virtually determinative," in part, because someone who knowingly "takes an endangered or threatened species" is subject to substantial civil and criminal penalties. *Id.*

Further, the biological opinion at issue in *Bennett* spoke specifically to the water use at issue in the case -- effectively answering a specific question that the plaintiff sought to challenge with respect to the precise injury plaintiff hoped to avoid. In contrast, a forest plan is simply a general planning document that speaks in broad strokes, providing guidelines about the management of a national forest. The application of the Plan at any site will require the consideration of a range of additional factors that could alter or eliminate the alleged environmental injury.

Finally, *Bennett* concerned the opportunity to prove the factual components of standing. Here, the Sierra Club falters on its legal theory of injury: that the existence of a long-term planning document creates a sufficient environmental injury to allow a broad facial attack on a forest plan.

3. The Sierra Club also alleges that it has a special interest in the way national forests are managed, so that the Forest Plan itself "work[s] a direct injury upon plaintiffs and their members by allowing damaging illegal and inefficient use of natural resources in national forest areas." JA 14.

Yet, this Court ruled long ago that the Sierra Club's "organizational interest" in Forest Service actions or in seeing that the law is obeyed is too generalized to confer standing. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

Respondents lack standing as taxpayers (and on related theories) to contest the economics of federal land actions. *E.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476-88 (1982); *Churchwell v. Robertson*, 748 F. Supp. 768, 776 (D. Id. 1990) (no standing on below-cost timber sale). Respondents' psychic or "stigmatic injury" in a plan-level challenge is too abstract to be legally cognizable. *Allen v. Wright*, 468 U.S. at 754-56; *see Raines v. Byrd*, 117 S. Ct. at 2317-18, 2320-22 (finding the "institutional injury" to legislators "too abstract" to be "legally and judicially cognizable" in a facial challenge).

4. Finally, it is important to acknowledge that a forest plan might include a specific provision immediately limiting pre-existing uses in some Management Area. An example might be a portion of a forest plan closing an area formerly open to snowmobile or other off-road vehicle use. *See* Fed. Opp. at 10 n.6 and 15. We do not dispute that someone who previously enjoyed snowmobiling in that area might have standing to challenge the designation of the area as off-limits. Such a plaintiff would suffer a direct injury from the forest plan without further Forest Service decisionmaking on an individual project. *See Defenders of Wildlife*, 504 U.S. at 561-62 (1992). This case, however, does not present such a direct injury from a forest plan.

B. Respondents' Facial Challenge To A Broad Land Use Plan Is Not Ripe For Review

Respondents' effort to mount a facial challenge to the Plan is also *not ripe*. This is particularly true under the "fitness for

review" component of this Court's ripeness jurisprudence and, arguably, as an Article III matter as well.[5]

1. With due regard for the constitutional separation of powers, federal courts must resist premature intrusion on the decisionmaking processes of the Executive Branch. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990) ("*NWF*"). A challenge to a broad agency action, such as a "regulation," is ordinarily considered ripe for review only when "the impact of the [action] upon the [plaintiffs] is sufficiently direct and immediate," such as where it requires an immediate change in business practices. *Abbott Lab. v. Gardner*, 387 U.S. 136, 152-54 (1967).

Ripeness principles thus serve "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging party." *Abbott Lab.*, 387 U.S. at 148-49. Where agency action does not *directly* injure a plaintiff, the courts should ordinarily stay their hand. Judicial review "stand[s] on a much surer footing in the context of a specific application of this regulation" or forest plan. *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163-64 (1967).

To be sure, "[s]ome statutes permit broad regulations to serve as the 'agency action,' and thus to be the object of

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[5] While this Court addressed the case-by-case approach as a matter of prudential ripeness in *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990), limiting judicial review to *concrete factual contexts* may also be viewed as an Article III constraint. *See Defenders of Wildlife*, 504 U.S. at 575-78; *Valley Forge*, 454 U.S. at 472-74.

judicial review directly, even before the concrete effects normally required for APA review are felt." *NWF*, 497 U.S. at 891. In contrast, Congress did not expressly subject forest plans to programmatic judicial review. Hence, under *NWF*, forest plans are within the normal rule that:

> a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. . . . The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect.

497 U.S. at 891, 894. That reasoning applies here. *NWF* precludes this broad challenge to, and broad relief against, an entire forest plan.

In fact, the Court observed that even where an agency has declared its *intent* "with respect to vast expanses of territory . . . to grant permission for certain activities, to interfere with other activities, and to take other particular action if requested," a challenge may have to await more concrete and imminent harm. *Id.* at 892. "It may well be . . . that even those individual actions will not be ripe for challenge until

some further action or inaction more immediately harming the plaintiff occurs." *Id.*

Consistent with *NWF*, the Sierra Club may, of course, employ a "case-by-case approach," challenging any timber sale that imminently threatens environmental injury. *NWF* allows review of the elements of the forest plan "to the extent that" they were relied upon in the decision to allow that timber sale. The scope and context of judicial review would necessarily be limited to the particular timber sale causing an Article III injury. The scope of relief would be similarly constrained. *See Lewis v. Casey*, 116 S. Ct. 2174, 2183-84 (1996).

Once a timber sale creates the concrete factual context required for a manageable ripe controversy, a court can address those aspects of the forest plan material to the challenged sale. *See* Pet. at 10; Fed. Opp. at 14 n.8; *Sierra Club v. Robertson*, 28 F.3d at 759 (in such a suit, the plaintiff "may assert that the proposed site-specific action is not consistent with the Plan, or that the Plan as it relates to the proposed site-specific action is inconsistent with the governing statutes"). Hence, the argument that plan-level challenges must be allowed or a forest plan "would forever escape review" (Pet. App. 4a) is mistaken. An aspect of the forest plan that actually contributes to a concrete injury would be subject to consideration in the context of such a concrete challenge. Only the aspects of the plan that never cause Article III injury would escape review by an Article III court.

2. Cases applying ripeness principles to zoning ordinances strongly support the conclusion that a facial challenge to a forest plan is not "ripe." Both forest plans and zoning ordinances channel later development proposals, but do not dictate development. In the seminal zoning case, the Court considered a facial challenge to "the ordinance as an entirety"

where it was alleged that the ordinance's "mere existence" caused a "present invasion of appellee's property rights" (direct injury) by lowering property values. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384-86 (1926).

The Court declined, however, to consider those aspects of the challenge that depended on how the ordinance would be applied to plaintiff because "it cannot be said that the land owner has suffered or is threatened with an injury which entitles him" to judicial review. *Id.* at 395-96. Such claims would be justiciable when "if ever, the provisions set forth in the ordinance . . . come to be concretely applied to particular premises" -- here, applied in the concrete facts of a particular timber sale. *Id.* at 395. Since *Euclid*, the strong preference for as-applied challenges, presenting issues in a concrete factual setting, runs though the next 70 years of zoning cases. *See Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1664-70 (1997) (summarizing cases).

3. The Eleventh and Eighth Circuits have correctly concluded that plan-level challenges are "unmanageable."[6] The

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[6] [N]o site-specific action will be taken pursuant to the Plan without a second stage of decisionmaking. . . . We have no doubt that some decisions in the Plan make an injury to the appellants [from timber harvesting] more likely. "More likely," however, does not make the injury imminent enough for purposes of judicial decisionmaking. We do not yet know when or how an injury to the appellants will occur, and this factual underpinning is vital to a full-fledged judicial review of the Plan.

Wilderness Soc'y, 83 F.3d at 390-91. "[W]ithout reference to a particular site-specific action" and concrete facts, judicial review becomes unmanageable and "would 'take[] us into the area of speculation and conjecture.'" *Sierra Club v. Robertson*, 28 F.3d at 758 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)).

complex provisions of a multiple use plan can be misinterpreted too easily, and the plan may not be implemented as the planning document predicts.

This case illustrates well the difficulties with plan-level review.[7] Review occurred in a factual vacuum. The Sixth Circuit apparently thought the Plan dictated rampant clearcutting across the large acreage of suitable lands. This arguably produced the broadsides that the Forest Service is biased, that clearcutting is limited to exceptional circumstances, and that the agency had improperly balanced timber production and primitive recreation uses.

Yet, the facts on implementation are: in the last eight years only 1,540 acres of the now over 177,000-acre Wayne National Forest have been harvested by even-aged methods. *See* pages 6-7, above. If this 1992 facial challenge to the Plan had not been allowed, and if the Sierra Club had waited for a few timber sales to establish a track record, it might not have

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[7] Respondents' merits arguments highlight the difficulty with resolving them outside the context of a specific timber sale decision. With respect to any given site, the generalized prescriptions of the Plan will intersect with the unique facts, including site conditions, pertinent to the particular tract. The agency's appeal decisions repeatedly emphasized the difficulty in addressing Respondents' challenges in the absence of a specific site proposal. Pet. App. 70a, 75a-88a, 94a, 98a-99a, 106a-107a. Similarly, the district court noted that many of Plaintiffs' arguments were directed at asserted failures to address issues "at specific locations" or on a "site-specific basis." Pet. App. 17a. The district court concluded that (Pet. App. 17a):

> A review of the Plan . . . shows that all of these concerns were addressed by the Forest Service and that the applicable statutes and regulations provide for a further assessment of these concerns on a site-specific basis when the Forest Service proposes to pursue specific projects in the forest.

been injured enough to warrant bringing an as-applied challenge. If an as-applied challenge had been brought, review could have been based on concrete facts, instead of speculation. *See Renne v. Geary*, 501 U.S. 312, 322-24 (1991) (review should be postponed until issues "can be litigated in the context of a concrete dispute" under the facts of an "as-applied challenge" where this could "materially alter the question to be decided").

C. The Disposition Is Not Changed By Respondents' Post-Appeal Filings

After the Petition for Certiorari was filed, Respondents sought to cure the standing difficulty by submitting affidavits to the district court. Respondents represent that two timber sale projects have proceeded under the Plan, that Respondents use some of the areas directly affected by these actions, and that the justification for these projects reflected "earlier controlling decision[s] of the Plan."[8] Sierra Club Opp. at 14. On this basis, the Sierra Club argues that "this case does not present the question suggested by Petitioner" regarding the justiciability of broad challenges to a forest plan. *Id.*

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[8] Except for mentioning that two timber sales have occurred, the affidavits merely reiterate the standing theory in the Complaint. For example, the assertion is made that areas "I have hiked or camped (and to which I plan to return) are within the 70% of the Wayne National Forest that are within the timber base, as established by the Wayne National Forest's Land and Resource Management Plan. As a result these areas are now open to timbering, mostly by clearcutting under the plan. . . . My recreational, professional, and scientific interests in these public forest areas will be directly and adversely *harmed if the Forest Service logs* in numerous locations of the Wayne National Forest." Affidavit of Jason Tockman at 2-3 (emphasis added) (attached to Pls.' Renewed Mot. for Summ. J. and Injunctive Relief, copy lodged with the Clerk of this Court).

1. Even if it were appropriate to take into account these post-appeal events and filings, there is no basis for *declining* to consider the justiciability of the Complaint as filed.[9]

Moreover, Respondents' challenge *to the Plan* remains non-justiciable. As filed, Respondents' suit took the form of a broad challenge to the Forest Plan, seeking "to prevent its implementation." Sierra Club Opp. at 14; *see* page 7, above. Because the Sierra Club is not injured by the *Plan*, and there is no justiciable controversy presented by its challenge to the *Plan*, the Sierra Club may not obtain the broad relief sought in its Complaint. The fact that specific actions have since been taken, and those actions might be subject to challenge on specific grounds, does not permit a challenge to the totality of the Plan itself or injunctive relief against the Plan. *See* pages 19-21, above.

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[9] The Court presumably has the power, but is certainly not required, to take into account such post-appeal events and filings. *Cf. NWF*, 497 U.S. at 894-98 (discussing the standard under which a court may consider supplemental affidavits following a summary judgment hearing). Moreover, even if these post-appeal events were found to give the Sierra Club standing to challenge *something* at this time, it would not bar this Court from addressing the important issue whether the Sierra Club had standing when the suit was filed. Events that took place *after* the case was decided by the court of appeals could not, *nunc pro tunc*, cure the jurisdictional defect in the original suit. Moreover, the later course of proceedings does not "moot" the Court's ability to resolve that important question. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125-27 (1974). Indeed, the Court's authority to address such a question is clearer than in other "capable of repetition but evading review" contexts: In most such contexts, the Court lacks actual jurisdiction at the time of its decision, but reaches an important question anyway. Even assuming the Sierra Club's post-appeal affidavits have cured the jurisdictional defect, this Court may consider any question addressed by the courts below as the case proceeded here.

This is precisely the distinction suggested in *Lujan v. NWF*. It is "entirely certain that the flaws in the entire 'program' cannot be laid before the courts for wholesale correction under APA, simply because one of them that is ripe for review adversely affects one of respondent's members." 497 U.S. at 892-93. To the contrary, any effort to challenge Plan provisions in the context of a specific timber sale would require particularized attention to the way that the Plan actually influenced that sale. Respondents, therefore, cannot cite the existence of a timber sale in order to maintain their current generalized Complaint against the Plan. *See id.* at 894-900 (essentially directing the dismissal of the complaint); *Wilderness Soc'y*, 83 F.3d at 391 n.9.

2. The question then remains whether subsequent events and filings should have any effect whatsoever on the way that the Court disposes of the case. If Article III jurisdiction was lacking when the lower courts rendered their decisions and/or is lacking now on the current Complaint, the Court's precedents generally favor reversing on jurisdiction and vacating the opinion below, without further comment on "the merits." *E.g., Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1068-72 (1997).

On occasion, however, this Court has found that intervening events have cured prematurity problems, or has otherwise proceeded to address merits issues after considering the hardships to the parties and judicial economy. *E.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-82 (1985); *Environmental Protection Agency v. National Crushed Stone Ass'n*, 449 U.S. 64, 72-73 (1980).

Based on Respondents' affidavits, it appears that there may be a ripe controversy of some sort concerning two timber sales. We believe that the ripe controversy would have to

focus on the facts of the two challenged timber sales and would differ substantially from the current facial attack on the Plan. The facts needed to resolve a challenge to those timber sales are obviously not before the Court.

Nonetheless, in such a case after vacatur and remand of this appeal, the Sixth Circuit is likely to credit its own prior *legal* conclusions on Forest Service bias, on protection of primitive recreation, and on a general ban against even-aged management as set forth in the opinion under review. Respondents say that the timber sales "relied on the earlier controlling decision of the Plan to include the project areas in the suitable timber base." Sierra Club Opp. at 14. In the interest of judicial economy, the Court need not require a "formal amendment" of the Complaint, *Schlesinger v. Councilman*, 420 U.S. 738, 744 n.9 (1975), in order to address the legal theories endorsed by the Sixth Circuit.

II. The Panel's Broadside On Agency Bias Is Inappropriate And Inconsistent With Law

The broad and abstract nature of Respondents' challenge to the Plan may have encouraged the broad and abstract declarations of the panel on the merits. The panel's approach was most abstract and, ultimately, destructive in its discussion of alleged Forest Service "bias." The panel's theory of agency bias provided the means by which the court denied deference to the agency's planning effort, and overturned the Plan without any serious consideration of the record and the agency's stated views. The panel's finding of bias denigrated the integrity of the Forest Service and its ability to administer the National Forest System as Congress has directed.

1. The court of appeals panel acknowledged at the outset that "it is generally accepted that federal agencies are entitled

to a presumption of good faith and regularity in arriving at their decisions." Pet. App. 5a. It went on to note, however, that the "presumption is not irrebuttable." *Id.* The panel, therefore, characterized the central question presented by the appeal as "whether the plan has been improperly skewed." *Id.*

After finding the Plan to be "predisposed toward clearcutting," the panel devoted several pages to developing the position that the Forest Service is biased in favor of timber production. App. 7a-8a. The panel ultimately concluded that:

> Each of these biases undermines even the facial neutrality of the National Forest Management Act. Even when there may be more valuable uses for the land, the above biases and constraints cause the Forest Service to manage primarily to maximize timber outputs.

Pet. App. 8a. "Each of these [alleged] biases" is rooted fully in the statutes under which the Forest Service operates.

First, the panel commented that, because the agency was created in part to "ensure a reliable timber supply, the Forest Service has a history of preferring timber production to other uses." Pet. App. 7a. This is an apparent reference to 16 U.S.C. § 475, which provides that national forests are established "to furnish a continuous supply of timber."

Second, by the "sharing of timber proceeds with the communities" surrounding a national forest, the Forest Service "becomes trapped" to issue timber sales as "[r]ural constituencies may provoke politicians to place pressure on the Forest Service to sustain that revenue." Pet. App. 7a. This was apparently a reference to 16 U.S.C. § 500. That section directs that 25% of national forest revenues (e.g., timber, grazing, and recreation revenues) be shared with local counties "for the benefit of the public schools and public roads."

Third, the "Forest Service budgeting process, which allows the Forest Service to keep a percentage of the funds it realizes from timber sales, provides an incentive for the Forest Service to sell timber below cost or at a loss." *Id.* at 7a. Specifically, the Knutson-Vandenberg Act allows timber sale revenues to be devoted to reforestation projects and other Forest Service costs associated with use of the renewable timber resource. 16 U.S.C. §§ 576-76d.

On their face, these statutory provisions reflect Congress' view that the sale of timber is an important national forest objective. The panel, however, viewed these features of existing law as "biasing" the Forest Service in favor of timber cutting and against primitive recreation.[10] On this basis, the panel apparently felt free to ignore the agency's reasoning, and to superimpose its judgment for the agency's, concerning the Forest Plan. In effect, the panel found that Acts of Congress render an agency biased in a judicially remediable way.

2. The Sixth Circuit's notion of bias, undermining the objectivity, integrity, and regularity of agency decisionmaking, carries the concept far beyond where it has been taken before. This may explain why Judge Batchelder disassociated herself from the bias portion of the opinion, stating that she did not "believe that the majority's undocumented broadside against the Forest Service is appropriate." Pet. App. 9a.

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[10] The panel apparently derived these political science/ sociological/economic theories from a book (RANDAL O'TOOLE, REFORMING THE FOREST SERVICE) it cited at Pet. App. 7a. No party had cited this book in its appeal brief. The district court had excluded an extra-record declaration by Mr. O'Toole, tendered by the Sierra Club. Pet. App. 56a-57a. The panel erred by relying on extra-record evidence and argument through the vehicle of Mr. O'Toole's book.

Remediable bias has historically been found only where a decisionmaker is subject to *extra*-legal influences. *Cf. Liteky v. United States*, 510 U.S. 540, 544-45 (1994). The concept of a statute-induced bias that the Sixth Circuit employed has no precedent in administrative law. Its application would allow *every* decision of an agency, no matter how cogently reasoned and well intentioned, to be second-guessed by the courts whenever the decision is perceived to be of some utility to an interest in whose favor the court believed the agency was institutionally biased.

Finding institutional bias because a *statute* creates a particular historic objective for the agency is, of course, an absurdity. An agency cannot be legally biased *because* it follows the law.[11] Precisely because the Forest Service was created to, and continues to be obliged by law to, "ensure a reliable timber supply," it cannot be faulted for doing so. *See* pages 2-3, above. Further, since 16 U.S.C. §§ 500 and 576b were amended by and are parts of the NFMA, the panel's finding that these provisions undermine the "facial neutrality of the" NFMA is nonsensical. Pet. App. 8a.

Equally untenable is the notion that the structural provisions of a law -- that local communities receive a portion of the proceeds of timber harvesting (and thus may "lobby" for such harvesting), or that the Forest Service itself shares in those proceeds -- in and of themselves *improperly* bias the agency's decisionmaking. Congress is presumptively aware of the potential for such structural factors, which it wrote into the

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[11] Conversely, in a non-legal sense, all agencies are "biased" by their statutory mission and sources of funding. For example, the National Park Service is "biased" in favor of preservation due to the mandate for management of national parks in 16 U.S.C. § 1.

law, to influence agency decisionmaking. Yet, notwithstanding such potential, Congress has allowed judicial review of Forest Service actions only under the standards set forth under the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 701-06.

The APA requires that an agency's action be judged on the terms on which the decision is written, according to the standards set forth by the APA and the governing statutes. Thus, review is to be based on the administrative record. Further, the agency's reasoning is to be judged on its own terms, according to the rationale the agency has presented in its decision. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-43 (1983).

Under the APA, the agency action must be affirmed unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706; *see Motor Vehicle Mfrs.*, 463 U.S. at 41-43. A court is not free to dismiss the agency's reasoning out of hand as insincere, biased, or deceitful, based on the court's intuition -- its sense of institutional sociology or psychology -- about subconscious influences on agency decisional processes. Absent nearly "irrefragable" proof of fraud or improper influence to the contrary, the courts are obliged to afford the official decisions of the Executive Branch a presumption that the decisions have been rendered with honesty and integrity. *See, e.g., United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); *Marine Shale Processors, Inc. v. Environmental Protection Agency*, 81 F.3d 1371, 1385 (5th Cir. 1996).

If Congress believes that the structural aspects of a statute are *improperly* influencing agency decisionmaking, Congress is, of course, free to change the administrative structure or to require the courts to subject particular agency decisions to a

more searching scrutiny.[12] But under the APA as written, "Congress has not empowered [courts] to substitute their judgment for that of the agency. Instead, it has limited judicial responsibility to insuring consistency with governing statutes and the demands of the Constitution." *FCC v. Schreiber*, 381 U.S. 279, 290-91 (1965). Hence, the Sixth Circuit could not use its policy judgment that the Forest Service is institutionally biased to create a duty to promote primitive recreation that is not found in any statute. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-48, 556-58 (1978); *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

3. It is singularly inappropriate for federal courts to make broad judgments about policy for federal lands.[13] The federal courts are constitutionally obligated to follow *congressional* direction on proper use of the public lands. If this were not

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[12] Congress may, of course, fully endorse the view that the timber or tourism interests of local communities surrounding national forests will prompt local support for a particular forest plan. That aspect of participatory democracy does not corrupt the process.

There may be circumstances of actual *improper* influence, in violation of law or statute, in which case there may be a form of judicially remediable bias. There was no evidence of improper influence here.

[13] *E.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984) ("[F]ederal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibility in the political branches.'") (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)); *Defenders of Wildlife*, 504 U.S. at 577.

sufficiently clear under separation of powers principles, it follows from the Constitution's Property Clause (Art. IV, § 3).

> The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." [*Light v. United States*, 220 U.S. 523, 537 (1911).] Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy.

United States v. City and County of San Francisco, 310 U.S. 16, 29-30 (1940); *see Kleppe v. New Mexico*, 426 U.S. 529 (1976).

At bottom, the panel's approach displays an absence of respect for the actions and duties of co-equal branches of government: disrespect for the statutory mandate established by Congress and disrespect for the Forest Service in carrying out that mandate. The panel has unfairly impugned the integrity of an entire agency and compromised its mission, stripping the agency of the deference that is its due under the APA and constitutional separation of powers.

III. The Sixth Circuit Erred In Finding That The Wayne Forest Plan Violates The NFMA

The principle that an expert agency is entitled to deference on policy choices, legal interpretations, and technical judgments -- upon a showing that the agency has properly considered and addressed all of the relevant criteria -- was found determinative of Respondents' challenges in the district court. *See* Pet. App. 11a-12a, 32a, 40a, 47a. The panel's perception of agency "bias" served to strip the Wayne Forest Plan of the presumption of regularity, allowing the panel to substitute its policy preferences for those of the expert agency.

The panel claimed to find "bias" exemplified in the Plan's treatment of clearcutting and primitive recreation, concluding that the "planning process was improperly predisposed toward clearcutting" and "arbitrarily undervalu[ed] the recreational value of wilderness." Pet. App. 5a-6a. The panel's reasoning process demonstrates how far it strayed beyond the sustainable limits of judicial review. Without *any* reference to the administrative record or *any* citation of case law, the panel reasoned that:

> Timbering simply does not promote the kind of recreational activities that are in demand in the Wayne . . . . In that particular environment, clearcutting loses its value . . . . The National Forest Management Act mandates that the Service ensure that even-aged management practices be used in the national forests only when "consistent with the protection of soil, watershed, fish, wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource." 16 U.S.C. § 1604(g)(3)(F)(v). The National Forest Management Act thus contemplates that even-aged management techniques will be used only in exceptional circumstances. Yet, the defendants would utilize even-aged management logging as if it were the statutory rule, rather than the exception. By arbitrarily undervaluing the recreational value of wilderness . . . . the Forest Service improperly concluded that clearcutting was necessary . . . . [W]e find that the Forest Service has failed to comply with the protective spirit of the National Forest Management Act. We further find that this non-compliance is an arbitrary act in excess of the statutory limitations provided in § 1604(g)(3)(F)(v).

Pet. App. 6a, 8a. Through this broad reasoning, the panel seems to have concluded that: (1) a court can override the Forest Service's policy judgment on the mix of multiple uses in a national forest; (2) primitive recreation should be

preferred over timber harvesting; (3) the NFMA has a strong protective spirit and creates enforceable environmental protection standards; (4) even-aged cuts are barred save for exceptional circumstances; and (5) the Plan improperly concluded that clearcutting is necessary. None of these propositions withstands serious scrutiny.

1. Making policy choices among multiple uses is a function Congress assigned to the Forest Service. The Sierra Club's and Sixth Circuit panel's "policy arguments [on the "best" management of national forests] are more properly addressed to legislators or administrators, not to judges." *Chevron*, 467 U.S. at 864.

The Multiple-Use Sustained-Yield Act and NFMA allow national forests to be managed for "sustained yield" and a variety of "multiple uses," which include both "outdoor recreation" and "timber" production. 16 U.S.C. §§ 528, 1604(e)(1). These statutes do not specify acreage to be devoted to, or the weight the Forest Service must attach to, any particular use. These statutes assuredly do not grant a priority to "recreation" uses, let alone to any specific form of recreation, such as wilderness or primitive recreation.[14]

[14] While the panel seems to have been concerned primarily with the "recreational value of wilderness" (Pet. App. 6a), this is only one of many forms of recreation and is called "primitive recreation" by forest planners. *See* DEIS at B4-4 to 17. Neither wilderness recreation nor primitive recreation are mentioned in, much less singled out for special protection in, the NFMA and MUSYA. The statutes use the more general term "outdoor recreation." The regulations call for a "broad spectrum of outdoor recreation opportunities" and establish no preference for, or minimum acreage for, primitive recreation. 36 C.F.R. § 219.21. Thus, in its multiple use balancing, the Forest Service must consider recreational uses other than primitive recreation.

Instead, MUSYA recognizes that the inevitable consequence of mixed use is that "some of the land will be used for less than all of the resources" and that "impairment" of some resource values is inherent where there are conflicting multiple uses. *Id.* § 531(a).[15] So does the NFMA. *See* pages 38-43, below. Decisions about the best and most advantageous uses have been entrusted to the Forest Service.

Such provisions "breathe discretion at every pore." *Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979); *Big Hole Ranchers Ass'n v. United States Forest Serv.*, 686 F. Supp. 256, 264 (D. Mont. 1988) (the "Forest Service has wide discretion to weigh and decide the proper uses within each area"). The courts must "defer to the agency's determination" of the appropriate "trade-offs" among conflicting multiple uses. *Sierra Club v. Espy*, 38 F.3d 792, 800-02 (5th Cir. 1994).

The Forest Service's attention to the need for timber as reflected in the Plan falls squarely within the range of permissible discretion entrusted to the agency. Had the Forest Service failed to provide for timber harvesting, it would have been derelict in its duties, for the "harvesting of timber is and always has been one of the purposes of the National Forest

[15] Section 531's grant of policy-based discretion is exceptionally broad. The Secretary is to manage "the various renewable resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services." *Id.*

System." Pet. App. 14a. The balanced Plan also provides for considerable primitive recreation.[16]

2. The Sixth Circuit's notion that primitive recreation must be preferred over timber production actually seems to invert the priorities set by Congress. National forests can be established only for certain primary purposes, including to "furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. § 475. MUSYA broadened the uses to which national forest lands could be put. But these newer uses, such as "recreation," were *not* to be exercised "in derogation of" the timber production purpose in "section 475." *Id.* § 528.

The Court squarely addressed these provisions in *United States v. New Mexico*, 438 U.S. 696 (1978), and distinguished between the primary and secondary purposes of federal land reservations, *id.* at 702. Under § 475, the primary purposes of the national forests include "furnish[ing] a continuous supply of timber for the people." *Id.* at 707. Under § 528, recreation is a "*secondary* purpose[]," which is "supplemental to, but not in derogation of," primary purposes like timber production. *Id.* at 714-15.

The NFMA was not specifically addressed in the *New Mexico* opinion. But the structure of the NFMA does not alter

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[16] The Plan allocates substantial acreage to primitive recreational uses, and was modified to be sensitive to such uses. *See* page 6, above. For example, to provide for more primitive recreation and other natural values, the Plan proposes to *decrease* historic timber production levels and to meet only 40% of timber demand. Pet. App. 71a, 101a. Regardless of the acreage the Plan formally *reserves* for primitive recreation, lands that are ultimately not developed (e.g., where the acreage of timber sales is less than projected) also remain fully available for primitive recreation.

the Forest Service's ultimate authority to set multiple use priorities and protection standards consistent with the MUSYA. Instead, the NFMA reinforces the basic multiple use mandate of MUSYA. The NFMA reemphasizes that a forest plan must "provide for multiple use and sustained yield of the products" (e.g., timber products) from a national forest "in accordance with the Multiple-Use Sustained Yield Act." 16 U.S.C. § 1604(e)(1). The "sustained yield" concept emphasizes "achievement" of a "high-level annual or regular periodic output of the various renewable resources," such as timber outputs through periodic timber sales. *Id.* § 531(b).

The NFMA is designed to ensure that the Forest Service fully *takes into account* a range of environmental and recreational issues. *See* 16 U.S.C. § 1604(g)(1)-(3). In other words, the NFMA, much like NEPA (42 U.S.C. § 4332), requires the agency to take a hard look at environmental effects (thereby procedurally channeling discretion), but does not place any explicit limit on how the agency is to rank multiple uses or set environmental protection standards in any particular instance. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). After the NFMA, use of the national forests for timber production remains a fundamental priority, not denigrated in relation to recreational or other uses.[17]

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[17] *See* 16 U.S.C. §§ 1601(d), 1604(e) and (m). While the NFMA emphasizes that timber harvesting should occur in an environmentally sensitive manner, Judge Posner found it equally true that the "Forest Service is not forbidden to consider the benefits to loggers, and hence to consumers of wood products, in deciding how to manage our national forests" -- "national forests, unlike the national parks, are not wholly dedicated to recreational and environmental values." *Cronin v. United States Dep't of Agric.*, 919 F.2d 439, 448

(continued...)

3. The Sixth Circuit's effort to find in the NFMA itself some substantive limit was fundamentally misplaced. If there were to be some substantive re-ordering of historic priorities, one would look to the *regulations* or the forest plan, not the NFMA provision (§ 1604(g)(3)(F)(v)) cited by the panel.

For example, to focus the issues presented in this case, the NFMA simply states that the Agriculture "Secretary shall . . . promulgate regulations" that will "specify[] guidelines for land management plans," including a guideline "insur[ing] that" even-aged "cuts are carried out in a manner consistent with the protection of" recreation and other resource values. 16 U.S.C. § 1604(g), (g)(3) and (g)(3)(F)(v). Instead of setting environmental protection standards by statute, Congress chose to allow the Forest Service itself to establish such standards in the regulations and the forest plans it publishes.

The NFMA's legislative history confirms Congress' intention to entrust discretion to the Forest Service to use its forest planning process and professional expertise to select a mix of multiple uses and desirable resource protection

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[17](...continued)
(7th Cir. 1990).

"[S]o long as Congress requires this Forest to be managed with multiple-use principles, portions of the Forest must embody a compromise between 'natural' Forest conditions and the need for Forest resources" like timber. *Krichbaum v. Kelley*, 844 F. Supp. 1107, 1119 (W.D. Va. 1994), *aff'd*, 61 F.3d 900 (4th Cir. 1995). "Maintenance of a pristine environment" runs "counter to the notion that NFMA contemplates both even- and uneven-aged management." *Sierra Club v. Espy*, 38 F.3d at 800. Preserving the forest in some pristine state "collides with the multiple uses that Congress has endorsed for the national forests in NFMA." *Sierra Club v. Robertson*, 784 F. Supp. 593, 599 (W.D. Ark. 1991), *aff'd*, 28 F.3d 753, 757 (8th Cir. 1994).

standards. As summarized by the Committee of Scientists established pursuant to 16 U.S.C. § 1604(h) to assist in developing regulations to implement the NFMA:

> [T]he legislative history of RPA/NFMA clearly bears out that Congress deliberately chose a planning process, rather than prescriptive guidelines, as the preferred method of dealing with the complex issues confronting the National Forest system. This was the choice inherent in the debate between the Randolph and Humphrey bills in the Senate.

44 Fed. Reg. 26602-03 (May 4, 1979).

Because any immutable environmental protection standard could be inappropriate somewhere in the "wide range of climatic conditions, topography, geologic and soil types, [and] vegetative covers" encountered in the over 100 national forests stretching from Florida to Alaska, the Senate Committee on Agriculture and Forestry "decided it would be unwise to legislate national prescriptions such as contained in S. 2926," Sen. Jennings Randolph's bill. S. Rep. No. 94-893 at 26 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6662, 6685. The Senate instead chose the more flexible approach of S. 3091, Sen. Hubert Humphrey's bill, which became the NFMA.[18]

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[18] The Senate granted the Forest Service the discretion to "promulgate regulations" that would develop appropriate "guidelines and standards to be applied in land management planning." 1976 U.S.C.C.A.N. at 6673; *see id.* at 6663-65. As Rep. Weaver described during the House Committee's mark-up, the Senate bill "left the details and the planning of forestry to the foresters" and the absence of statutory standards that apply directly to a forest plan or on the ground would "avoid lawsuits." BUSINESS MEETINGS ON NATIONAL FOREST MANAGEMENT ACT OF 1976, COMM. ON AGRIC., U.S. HOUSE OF REP., 94TH CONG., 2D SESS. 252-53 (Comm. Print 1976). In contrast, the "House subcommittee bill, by statute" would have contained the

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Supreme Court, U.S.
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No. 97-16

In the Supreme Court of the United States

OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC., PETITIONER

v.

SIERRA CLUB, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

In accordance with the National Forest Management Act of 1976, the United States Forest Service developed a Land and Resource Management Plan (LRMP) for the Wayne National Forest. Respondents filed suit to challenge the plan, contending that it overemphasized timber harvesting at the expense of other uses of the forest and improperly relied on clearcutting as the primary method of harvesting. The court of appeals held that the case was justiciable and that the Forest Service had acted arbitrarily and capriciously in devising the plan. This case presents the following questions:

1. Whether respondents' challenge to the Wayne LRMP presents a justiciable controversy.

2. Whether the court of appeals erred in holding that the LRMP at issue in this case was inconsistent with applicable legal requirements.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-16

OHIO FORESTRY ASSOCIATION, INC., PETITIONER

v.

SIERRA CLUB, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 105 F.3d 248. The opinion of the district court granting summary judgment (Pet. App. 10a-48a) is reported at 845 F. Supp. 485. An earlier opinion of the district court (Pet. App. 49a-65a) is unreported. The decisions of the Chief of the United States Forest Service (Pet. App. 66a-77a, 78a-130a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1997. Petitions for rehearing were denied on April 7, 1997. Pet. App. 131a-132a. The petition for a writ of certiorari was filed on July 1, 1997, and was granted on October 20, 1997. 118 S. Ct. 334. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Agriculture's Forest Service is responsible for managing the 191 million acres of land that comprise the National Forest System. See 58 Fed. Reg.

19,369 (1993). Under the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976 (NFMA), the Secretary of Agriculture is required to "develop, maintain, and, as appropriate, revise land and resource management plans [LRMPs or forest plans] for units of the National Forest System." 16 U.S.C. 1604(a). The Act directs the Secretary to "provide for public participation in the development, review, and revision of land management plans," 16 U.S.C. 1604(d), and establishes certain criteria to which LRMPs must conform, 16 U.S.C. 1604(e) and (f).

Under current Forest Service regulations, forest plans in large part furnish overall programmatic guidance for the management of the forest, although particular provisions may have an immediate impact on concrete, on-the-ground activities. Forest plans are intended to "provide for multiple use and sustained yield of goods and services from the National Forest System in a way that maximizes long term net public benefits in an environmentally sound manner." 36 C.F.R. 219.1(a). They "guide all natural resource management activities and establish management standards and guidelines for the National Forest System." 36 C.F.R. 219.1(b). The plans "determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management." *Ibid.* An LRMP includes forest-wide management standards and guidelines, 36 C.F.R. 219.13-219.27, and establishes management area prescriptions applicable to future activities in each area of the forest, 36 C.F.R. 219.11(c). An LRMP must also include monitoring and evaluation requirements designed to provide a basis for evaluating the effects of the management practices established by the plan. 36 C.F.R. 219.11(d).

The standards and guidelines and the management area prescriptions govern the Forest Service's decisions with

respect to individual timber harvesting or other ground-disturbing projects. Forest Service regulations require the agency to maintain the viability of existing species, 36 C.F.R. 219.19, and to provide for "diversity of plant and animal communities and tree species," 36 C.F.R. 219.26. LRMPs are also required to address water and soil resources, 36 C.F.R. 219.23, and cultural and historic resources, 36 C.F.R. 219.24. Plans also are required to identify those areas of the forest "not suited for timber production," 16 U.S.C. 1604(k); 36 C.F.R. 219.14, and to establish the maximum allowable sale quantity (ASQ) of timber for a forest over the life of a plan, 36 C.F.R. 219.16.[1] Forest plans must be prepared in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* (see 16 U.S.C. 1604(g)(1)), and must be revised at least every 15 years. 16 U.S.C. 1604(f)(5)(A); 36 C.F.R. 219.10(g).

The NFMA provides that "[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." 16 U.S.C. 1604(i). If a proposed site-specific activity is not consistent with the forest plan, the Forest Service may "[m]odify the proposal to make it consistent with the forest plan"; "[r]eject the proposal"; or "[a]mend the plan to permit the proposal." 53 Fed. Reg. 26,836 (1988). As to those activities about which a plan provides only programmatic guidance, however—in contrast to any on-the-ground activities that are directly affected by the plan itself—the fact that a proposed activity is consistent with the applicable LRMP does not mean that it will actually go forward, or that it can be undertaken without further scrutiny. Rather, when an individ-

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[1] ASQ is defined as the "quantity of timber that may be sold from the area of suitable land covered by the forest plan for a time period specified by the plan." 36 C.F.R. 219.3.

ual project (such as a timber sale) is proposed, the agency undertakes an individualized assessment of its likely environmental effects and renders a formal decision regarding it. See *id.* at 26,832; 58 Fed. Reg. 19,370-19,371 (1993); *Sierra Club* v. *Robertson*, 28 F.3d 753, 758 (8th Cir. 1994).[2] The Forest Service is required by statute to provide opportunities for public notice and comment, along with a right of administrative appeal, for all "proposed actions of the Forest Service concerning projects and activities implementing [LRMPs]." Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, § 322, 106 Stat. 1419 (1992) (16 U.S.C. 1612 note); see 58 Fed. Reg. at 19,370 ("With section 322 of the Act, Congress recognizes that critical decisions irretrievably committing resources generally occur at the project level of decisionmaking."). The agency's final decision on the proposed project is then subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*[3]

2. The Forest Service is authorized by the NFMA to utilize both "evenaged" and "unevenaged" timber harvesting techniques. An "evenaged" technique is one "aimed at creating a regeneration of trees which are essentially the

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[2] The Forest Service has substantial discretion to include provisions in a plan or a plan amendment that are to be applied immediately to site-specific activities. The instant case, however, presents no question concerning the application of such provisions.

[3] Section 322(d)(4) of the special Forest Service statute provides that, "[i]f the Secretary [of Agriculture] fails to decide the appeal within the 45-day period [after the closing date for filing an administrative appeal], the decision on which the appeal is based shall be deemed to be a final agency action for the purpose of chapter 7 of title 5, United States Code." 108 Stat. 1420 (16 U.S.C. 1612 note). The statute thus confirms that final agency decisions regarding individual site-specific activities will be subject to judicial review under the APA.

Regulations implementing Section 322 were promulgated in 1993, see 58 Fed. Reg. 58,904, and are codified at 36 C.F.R. Part 215.

same age." Pet. App. 2a. One evenaged technique is clearcutting, which involves the removal of all trees within a given area at the same time. *Ibid.* Other evenaged techniques are seed-tree and shelterwood cutting, in which some trees in an area are left standing for a time to assist in the generation of new trees around them, and then are cut down to leave only younger trees of the same age. *Id.* at 15a.

The NFMA directs the Secretary to "insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an evenaged stand of timber will be used as a cutting method on National Forest System lands only where" specified criteria have been satisfied. 16 U.S.C. 1604(g)(3)(F). The Secretary is required, in particular, to ensure that evenaged management techniques "are carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and the regeneration of the timber resource." 16 U.S.C. 1604(g)(3)(F)(v). The Act further provides that clearcutting may be used as a method of evenaged harvesting only where "it is determined to be the optimum method * * * to meet the objectives and requirements of the relevant land management plan." 16 U.S.C. 1604(g)(3)(F)(i).

3. a. This case involves a challenge to the LRMP developed for the Wayne National Forest in southern Ohio and approved by the Regional Forester in January 1988. In accordance with the NFMA and current planning regulations, the Wayne LRMP divided the forest into various management areas, identified forest lands not suitable for timber production, adopted standards and guidelines to guide subsequent decisions regarding timber harvesting and other use of natural resources, and established an overall ASQ for timber production from the Forest. The Wayne LRMP addressed the issue of aggregate timber

production by designating 126,107 (out of 176,787) federally owned acres in the forest as suitable for timber production, and by setting the ASQ at an average of 7.5 million board feet per year (*i.e.*, 75 million board feet total) during the first decade of the plan. See Plan 4-7, 4-180; Record of Decision (ROD) 18, 19; Pet. App. 33a.[4] The plan "provide[d] for even-aged management on 80 percent of the suitable forest land and for uneven-aged management on the remaining 20 percent." ROD 18; see Plan 3-5 ("Approximately 21 percent of the suitable timber land will be managed under an uneven-aged silvicultural system," with "even-aged management on the remaining 79 percent of the suitable acres"); Pet. App. 16a.[5]

Although the LRMP designated 126,107 acres within the forest as suitable for timber production, it projected that only 7,835 acres would be harvested during the first decade of the plan. Plan 4-180. Of that acreage, it was projected that 5,075 acres would be harvested by evenaged methods and 2,760 acres by unevenaged methods. *Ibid.*; see Pet. App. 16a. The LRMP explained the rationale for timber management and harvesting techniques; the respective advantages of seed-tree, shelterwood, and clear-

[4] We have lodged a copy of the Land and Resource Management Plan for the Wayne National Forest, the Record of Decision, the Draft Environmental Impact Statement, and the Final Environmental Impact Statement with the Clerk of this Court.

[5] Appendix C to the LRMP explained the Forest Service's choice of vegetation management practices for each "management area" of the forest. For management areas 3.1, 3.2, 3.3, and 6.1, Appendix C projected the use of evenaged techniques as the primary method of timber harvesting. Plan App. C-6 to C-7; see also Plan 4-90 to 4-91, 4-98, 4-104, 4-118 to 4-119. Management area 3.1 contains 28,086 acres of land found to be suitable for timber harvesting; management area 3.2 contains 13,362 such acres; management area 3.3 contains 48,553 such acres; and management area 6.1 contains 9,641 such acres. See Plan 4-168, 4-170, 4-172, 4-174. Taken together, those management areas contain a total of 99,642 suitable acres—79% of the 126,107 acres identified by the Plan (see Plan 4-7) as suitable for timber harvesting.

cutting for particular areas and types of species; and the circumstances that would render clearcutting the optimal method to meet the overall objectives of the LRMP. See Plan App. C; Pet. App. 20a-26a.

The Regional Forester issued an ROD explaining the forest plan, as well as his reasons for selecting it from among seven alternatives. The ROD observed that "[t]he emphasis of the Forest Plan is not on site-specific decisions or specific outputs." ROD 38. It explained (*ibid.*):

> As a long-range strategy for the Forest, this Forest Plan and the accompanying FEIS [final environmental impact statement] are programmatic in nature. During implementation, when the various projects are designed, more site-specific analyses will be developed. These analyses may result in environmental assessments, environmental impact statements or categorical exclusions and, possibly, an amendment or revision of the Forest Plan.

b. Respondents Sierra Club and Citizens Council on Environmental Control (Citizens Council) each filed an administrative appeal from the Regional Forester's decision approving the plan.[6] In his decisions rejecting those administrative appeals, the Chief of the Forest Service emphasized that the plan did not incorporate binding decisions to undertake individual timber sales. Thus, in addressing the contention that the plan would permit timber harvesting on land that should have been designated as not suited for timber production (see 16 U.S.C. 1604(k)), the Chief stated:

> During implementation of the Forest Plan, the costs and benefits of different ways to carry out timber sales

[6] Pursuant to Forest Service regulations, the decision by a Regional Forester to approve an LRMP is subject to administrative appeal by members of the public. See 36 C.F.R. Pt. 217, 219.10(d).

> are evaluated on a sale-by-sale basis. For each proposed sale, a no action alternative, which has no timber harvesting, is also considered. Specific information related to current timber prices as well as the costs of timber harvesting are available to support judgements about the practicality of specific timber sale proposals and to support final decisions of whether or not to proceed with specific timber sales. You have opportunities to be involved in these decisions and to appeal them if you disagree.

Pet. App. 70a; see also *id.* at 75a ("the Forest Plan represents only one level in decisionmaking about the management of the Wayne National Forest and * * * final decisions are yet to be made on many matters of evident concern to the appellants"); *id.* at 100a ("The Forest Plan makes no promise or assurance that the ouputs for any resource, including timber, will actually occur at the projected level.").

With respect to clearcutting in particular, the Chief observed that "[t]he optimality determination in the Wayne Forest Plan is appropriate as programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain areas of the Forest to achieve specific management objectives." Pet. App. 98a. The Chief observed, however, that, under established Forest Service practice, "certain specific findings required by NFMA, including determinations on the appropriateness of even-aged management and the optimality of clearcutting, must be made and documented during Forest Plan implementation on a project-by-project basis." *Id.* at 98a-99a. The Chief explained:

> The Forest Plan does not make the site-specific finding required by NFMA that clearcutting is the optimum method for harvesting. While clearcutting is allowed it is not mandated by the Forest Plan. The final decision on which harvest method will be used on a particular site will be based on a site-specific silvicultural prescription and interdisciplinary review. As the Forest Plan is implemented, the Regional Forester must ensure that alternative cutting methods to meet site-specific conditions and objectives are considered before making a finding that clearcutting is the optimum cutting method.

Id. at 99a; see also *id.* at 76a, 103a.

4. Subsequent to their administrative appeals, respondents Sierra Club and Citizens Council filed suit challenging the Wayne Forest LRMP.[7] They contended that the plan (1) overemphasized timber harvesting at the expense of other uses of the forest (by designating too many acres as suitable for timber harvesting and by setting the ASQ at too high a level), and (2) improperly relied on clearcutting as the predominant method of harvesting. Thus, their second amended complaint alleged that the Wayne LRMP "places the objective of timber harvesting above all other uses"; "designat[es] economically and environmentally unsuitable lands for timbering"; "lacks site-specific determinations that clearcutting is the 'optimal' method of harvesting timber in the Wayne"; "fails to demonstrate the **optimality** of clearcutting as the method of harvesting timber for the Wayne as a whole"; "fails to demonstrate that timber harvest will be cost effective and omits any site specific analysis to determine cost effectiveness"; and "fails to demonstrate that the non-timber use benefits

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[7] Respondents' initial complaint (Pet. App. 133a-145a) was filed March 18, 1992. Their second amended complaint (J.A. 12-27) was filed June 22, 1993. The second amended complaint invoked, *inter alia*, the NFMA and the NEPA, 42 U.S.C. 4332. J.A. 12-13. Neither of those statutes contains its own judicial review provision. As the district court recognized, judicial review therefore could be available only under the APA. Pet. App. 10a; see J.A. 13.

alleged to be achieved through the timber program are really needed." J.A. 19.[8]

With respect to standing, respondents alleged that their members visit the Wayne National Forest for recreational, avocational, occupational, and professional purposes, and that their members "visit portions of the Forest which under the current management plan for the Forest have been or will be subject to clearcutting or other forms of logging." J.A. 13. They further alleged that the actions of the Forest Service would "allow[] damaging illegal and inefficient use of natural resources in national forest areas" and would "result in direct and substantial injury to the plaintiffs and their members by reducing their enjoyment of, and ability to use, the Wayne." J.A. 14.

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[8] In arguing that the Wayne LRMP overemphasized timber production generally, and clearcutting in particular, respondents did not contend that the projections contained in the plan exceeded some numerical or other substantive threshold imposed by federal environmental laws. Neither the NFMA nor the implementing regulations establish such a threshold. Rather, the gravamen of respondents' complaint was that various flaws in the Forest Service's decisionmaking *process* had led to the adoption of arbitrarily high timber harvesting projections. See, *e.g.*, J.A. 18 (alleging that, in identifying areas suitable for timber production, the Forest Service "ignored relevant economic information, selected harvest levels first, and then excluded from the suitable timber base only those lands not needed to meet the predetermined harvest levels"); J.A. 20 (alleging that, the Forest Service "arbitrarily and unlawfully disregarded the conditions surrounding the federal holdings in the Wayne"); J.A. 21 (alleging that the Forest Service "failed to adequately consider or value the detrimental effects of the below-cost timber sales"); J.A. 22 (alleging that "[t]he plan and its associated environmental impact study do not contain sufficient data or analysis concerning the plan['s] impact on water resources"); J.A. 23 (alleging that "[t]he FORPLAN program which the forest service used to develop the plan for the Wayne included numerous false and unjustified assumptions which arbitrarily biased the plan in favor of timbering"); *ibid.* (alleging that the Forest Service unlawfully failed to consider "a reasonable and broad set of alternatives" to the plan actually chosen).

The second amended complaint set forth statistics concerning the Forest Service's aggregate revenues and expenses for timber sales in the Wayne National Forest for the fiscal years 1987-1990. J.A. 18. Respondents did not, however, identify any specific timber sales that had occurred or would occur in the Wayne National Forest during the years covered by the plan. The requested relief included, *inter alia*, "an injunction prohibiting further timber sales and clearcutting until the plan and its environmental impact statement are revised, subject to public and administrative review, to bring them into conformity with law." J.A. 24; see also J.A. 26. Petitioner Ohio Forestry Association intervened as a defendant in the district court.

The district court granted the government's motion for summary judgment. Pet. App. 10a-48a. Neither petitioner nor the government contended that the suit was nonjusticiable. The district court's only reference to the issue was its statement that, "[i]n those management prescriptions which include clearcutting, there is a determination that clearcutting is the optimum method to meet the objectives and requirements of the Plan and the rationale for that determination is explained. This determination will substantially affect future decisions and is ripe for review." *Id.* at 20a (citation omitted).

The district court addressed and rejected respondents' challenges to the general policy determinations reflected in the plan, while noting that questions concerning the application of general policies to particular circumstances could be "deferred until there is a proposal of a specific timber sale at a specific site." Pet. App. 19a. The court stated that respondents' concerns about the consequences of clearcutting "were addressed by the Forest Service and that the applicable statutes and regulations provide for a further assessment of these concerns on a site-specific

basis when the Forest Service proposes to pursue specific projects in the forest." *Id.* at 17a. The court observed as well that, "[w]hile the Plan narrows the scope of future environmental analyses, an environmental analysis will be completed for each project which will focus on site-specific issues, alternatives and environmental consequences unique to the project." *Id.* at 25a.

The district court also held that the Forest Service had acted reasonably in designating the total acreage suitable for timber production and in setting the ASQ at 7.5 million board feet per year. The court noted in the latter regard that "[t]he ASQ does not determine the actual amount of timber which will be sold but sets the upper limit for the plan period. The actual amount of timber sales may be less and will depend on several unpredictable factors, including the budget of the Forest Service, the market for wood products and other conditions which may limit the practicality of offering sales at levels developed in the Plan." Pet. App. 33a. The court observed in addition that, "[i]f the suitable timber base exceeds the amount required to meet the timber production goals of the Plan, that appears to be of little consequence except to give the Forest Service greater latitude in determining just where in the forest the timber harvests will occur." *Id.* at 37a.

5. The court of appeals reversed. Pet. App. 1a-9a. The court first held that respondents' facial challenge to the forest plan was suitable for adjudication.[9] The court found

[9] Relying principally on the intervening decision in *Sierra Club* v. *Robertson*, 28 F.3d 753 (8th Cir. 1994), the government contended in the court of appeals that respondents' suit was nonjusticiable, both because respondents lacked standing to sue and because their claims were not ripe for adjudication. See Gov't C.A. Br. 17-25. The government did not argue that a forest plan is *never* subject to judicial challenge. The government's brief stated that "[i]f, for example, a plan incorporated a final decision to close a specific area to off-road vehicles, the plan itself could result in imminent concrete injury to a party with an interest in the use of off-road vehicles in that area." *Id.* at 20. The government contended, however, that the Forest Service's promulgation of the LRMP for the Wayne National Forest did not give rise to actual or imminent injury to respondents, since the plan did not mandate that any particular timber harvesting activities would go forward, and since any proposed timber sale would be scrutinized individually prior to implementation to ensure compliance with applicable environmental laws. *Id.* at 21-23.

that respondents had standing to sue, asserting that LRMPs "represent significant and concrete decisions that play a critical role in future Forest Service actions." *Id.* at 4a. It held that, "[i]f [respondents were] allowed to challenge the Forest Service plan only at the site-specific stage, then the meaningful citizen participation contemplated by the [NFMA] 'would forever escape review.'" *Ibid.* (quoting *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992)). The court of appeals also held that respondents' claims were ripe for review, concluding that respondents "need not wait to challenge a specific project when their grievance is with an overall plan." *Ibid.*

On the merits, the court concluded that the forest plan was arbitrary and capricious because "the planning process was improperly predisposed toward clearcutting." Pet. App. 5a. After quoting the text of the NFMA requiring that evenaged management be "consistent" with the protection of natural resources and regeneration of the timber resource (see 16 U.S.C. 1604(g)(3)(F)(v)), the court expressed the view that the NFMA "contemplates that even-aged management techniques will be used only in exceptional circumstances." Pet. App. 6a. It faulted the Wayne LRMP on the ground that the Forest Service "would utilize even-aged management logging as if it were the statutory rule, rather than the exception." *Ibid.* The court asserted as well that "the Forest Service has a history of preferring timber production to other uses," and

that "forest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse." *Id.* at 7a. The court of appeals reversed the district court's order granting summary judgment for the government and remanded the case for further proceedings. *Id.* at 8a.[10]

6. While the petition for a writ of certiorari was pending in this Court, proceedings commenced in the district court on remand from the court of appeals' decision. Respondents filed a renewed motion for summary judgment and attached affidavits of three of their members addressed to the issue of standing. See Sierra Club/Citizens Council Br. in Opp. 10-11.[11] The affiants attested that they regularly utilize specific areas within the Wayne National Forest that were identified as suitable for timber harvesting under the 1988 LRMP. Two of the affidavits stated that ongoing timber projects, temporarily put on hold by the Forest Service, had been scheduled for areas of the forest utilized by the affiants. See Affidavit of Stephen J. Ostrander at 4; Declaration of Jason Tockman at 2-3. On September 5, 1997, the district court issued an order prohibiting the "timbering, thinning, and/or burning of trees" in the Bluegrass Ridge Restoration and Markin Fork timber projects pending further order of the court. *Sierra Club* v. *Dombeck*, No. C2-92-249 (S.D. Ohio). The proceedings in the district court have been held in abeyance since this Court granted the petition for a writ of certiorari.

[10] Judge Batchelder concurred separately. Pet. App. 9a. She agreed with the majority that the case presented a justiciable controversy, and she "agree[d] that the record before [the court] supports a conclusion that the Forest Service has not complied with the mandates of the [NFMA] relative to even-aged management practices in adopting the Plan." *Ibid.* While believing that there were "serious questions and concerns about the management practices and policies of the Forest Service," however, she stated that she "d[id] not believe that the majority's largely undocumented broadside against the Forest Service is appropriate." *Ibid.*

[11] Petitioner has lodged copies of the motion and attached affidavits with the Clerk of this Court.

SUMMARY OF ARGUMENT

1. The plan provisions at issue in this case do not authorize or require the Forest Service to go forward with any timber harvesting project without a further, individualized consideration of its likely environmental effects. Although the agency's adoption of a forest plan can be expected to have a significant effect on the nature and extent of subsequent timber harvesting activities, the anticipated impact of the challenged plan provisions upon the overall management of the Wayne National Forest does not provide a sufficient basis for concluding that respondents' facial challenge presents a ripe controversy. Rather, under the current statutory and regulatory regime, respondents should be required to challenge individual timber harvesting activities threatening concrete injury to their members.

Channeling judicial review in that manner ensures that the challenged LRMP provisions are considered not in the abstract, but in their application to a particular on-the-ground decision. That mode of review also ensures that any relief the court may order is narrowly tailored to redress respondents' own injury. Requiring respondents to challenge individual site-specific activities also ensures that the resources of the Forest Service and the courts are not diverted to needless litigation concerning plan projections that ultimately fail to materialize. Finally, the absence of any substantial prejudice to respondents from deferral of their legal challenge reinforces the conclusion that the instant suit should not have been adjudicated.

2. The affidavits submitted by respondents to the district court on remand, even assuming that they are properly before this Court, do not render this suit justiciable. The affidavits suggest that respondents (or the

affiants themselves) could file suit to challenge individual timber sales, provided that they can satisfy finality and exhaustion requirements. Respondents could not, however, pursue the present broad-based attack on the Wayne LRMP simply by showing that they would be injured by individual on-the-ground activities.

3. If this Court holds that respondents' challenge to the Wayne LRMP is suitable for adjudication, the judgment of the court of appeals should be reversed on the merits. The NFMA requires that any use of evenaged management must satisfy certain prerequisites that do not apply to unevenaged methods, but it imposes no numerical limit on the use of evenaged techniques within a particular forest. The plan and associated documents adequately explained and supported the projections contained in the Wayne LRMP. The fact that those projections have to a significant degree failed to materialize does not mean that the projections were arbitrary when made; it simply shows that the Forest Service's overall decision-making process provides mechanisms for ensuring that changed circumstances are taken into account in applying programmatic guidance to individual project decisions over the life of the plan.

ARGUMENT

I. THE PROVISIONS OF THE LAND AND RESOURCE MANAGEMENT PLAN FOR THE WAYNE NATIONAL FOREST THAT ARE THE SUBJECT OF THIS LAWSUIT ARE NOT JUSTICIABLE IN THE CONTEXT OF A FACIAL CHALLENGE

Respondents have not contended that the LRMP at issue here requires the Forest Service to undertake or permit specific timber harvesting activities at identified locations in the Wayne National Forest. Their argument

instead is that the LRMP contains programmatic guidance that will influence the Forest Service's subsequent decisions concerning proposed timber harvesting projects over the life of the plan, and that at least some of those projects are, in turn, likely to cause injury to some of respondents' members. Although we believe that respondents have not shown that any of their members are sufficiently likely to experience injury as a result of timber harvesting activities in the future to satisfy Article III standing requirements, the Court in our view can most readily and appropriately resolve this case by holding that respondents' facial challenge to the relevant plan provisions is not ripe for review under the general judicial review provisions of the APA. If and when a specific timber sale threatening concrete harm to one of respondents' members actually becomes imminent, respondents can obtain administrative and (if necessary) judicial review of the proposed sale.

A. Principles Of Both Standing And Ripeness Serve To Ensure That Litigation Against The Government Is Not Brought Prematurely And That Disputed Legal Issues Are Considered In A Concrete Setting

Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies." "All of the doctrines that cluster about Article III —not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt* v. *O'Neill*, 699 F.2d 1166, 1178-

1179 (D.C. Cir.) (Bork, J., concurring), cert. denied, 464 U.S. 823 (1983)).

Article III's case-or-controversy requirement serves in part to ensure that disputed legal questions "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Even more fundamentally, however, "the 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen*, 468 U.S. at 750. By authorizing the federal courts to resolve disputed legal questions "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy," *Valley Forge*, 454 U.S. at 471 (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)), the case-or-controversy requirement protects the separation of powers by ensuring that the Judicial Branch does not exercise a general superintendence over the workings of the federal government.[12]

The present case implicates two of "the doctrines that cluster about Article III," *Allen*, 468 U.S. at 750—the doctrines of standing and ripeness. To establish standing to sue, "a plaintiff must, generally speaking, demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision."

[12] See also *Allen*, 468 U.S. at 760 (abandonment of standing requirements "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action") (quoting *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972)); *Lewis* v. *Casey*, 116 S. Ct. 2174, 2179 (1996) (doctrine of standing embodies "a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches").

Bennett v. *Spear*, 117 S. Ct. 1154, 1161 (1997) (internal quotation marks omitted).[13] This Court has noted, in particular, that "[a]llegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990) (internal quotation marks omitted). Accord *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (Article III requires allegation of injury that is "actual or imminent, not conjectural or hypothetical") (internal quotation marks omitted).

"[R]ipeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18 (1993) (citing *Buckley* v. *Valeo*, 424 U.S. 1, 114 (1976) (per curiam); *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588 (1972)). The determination whether a dispute is ripe for adjudication involves an inquiry into "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967); accord *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967). The "basic rationale" of ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories*, 387 U.S. at 148-149.

[13] See also, *e.g.*, *Raines* v. *Byrd*, 117 S. Ct. 2312, 2317-2318 (1997); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Valley Forge*, 454 U.S. at 472; *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

Thus, principles of ripeness, and in part those of standing, serve to address the dangers inherent in *premature* involvement of the judiciary in the affairs of the political branches. Neither of those doctrines, however, establishes a rigid rule that litigation against the government must always be postponed until the last conceivable moment. Most significantly, Congress possesses substantial discretion to determine the proper form and timing of challenges to particular categories of agency action.[14] Even

[14] Thus, while "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA" until it has been applied to a particular claimant, "[s]ome statutes permit broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Congress has included provisions in many environmental statutes, for example, that authorize judicial review by specific courts only within a prescribed period after agency action in order to ensure national uniformity, to secure prompt and final resolution of disputes concerning agency actions to protect the public health and welfare, and to protect the reliance interests of States and the regulated community. See, *e.g.*, 15 U.S.C. 2618 (Toxic Substances Control Act); 30 U.S.C. 1276(a) (Surface Mining Control and Reclamation Act of 1977); 42 U.S.C. 6976 (Resource Conservation and Recovery Act of 1976); 42 U.S.C. 7607(b) (Clean Air Act); 43 U.S.C. 1349(c)(3) (Outer Continental Shelf Lands Act); *Harrison* v. *PPG Indus.*, 446 U.S. 578, 592 (1980) (noting that the purpose of 42 U.S.C. 7607(b) is "to provide prompt pre-enforcement review of EPA action"); *National Mining Ass'n* v. *United States Dep't of Interior*, 70 F.3d 1345, 1351 (D.C. Cir. 1995) (noting that 30 U.S.C. 1276(a) reflects "Congress' careful effort to force potential litigants to bring challenges to a rule * * * at the outset unless they can meet the after-arising test"). A congressional judgment regarding the proper timing and circumstances of judicial review under federal agency programs is entitled to substantial respect. Compare *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before"). Our position that respondents here have not established standing therefore is not intended to call into question the availability of judicial review

where Congress has not addressed the issue directly, leaving the mode and timing of judicial review to be governed by the more general provisions of the APA, agency rules may appropriately be subject to facial challenge where prolonged uncertainty concerning the applicable law would subject the plaintiff to substantial hardship.[15] In determining when and in what form a suit may properly be brought, relevant factors may include: the statutory and regulatory regime; the degree to which actual injury to the plaintiff is likely to occur and the availability of administrative procedures to prevent or mitigate any such injury; the fitness of the legal issues for immediate judicial resolution; whether the agency concerned has made a formal determination that an opportunity for review will further program management by permitting early resolution of disputes concerning crucial issues; the degree to which the court's understanding of agency policy might be assisted by observing the application of that policy to a concrete factual setting; the possibility that deferral of the suit will obviate the need for litigation altogether; the likelihood that the parties will be prejudiced if adjudication of the suit is either undertaken prematurely or delayed unnecessarily; and the court's capacity to fashion appropriate relief if the plaintiff prevails. Applying those factors here, respondents' suit should be dismissed.

of regulations and comparable administrative measures under those special judicial review provisions.

[15] See *Abbott Laboratories*, 387 U.S. at 154 (plaintiffs had standing to assert facial challenge to regulation that "require[d] them to make significant changes in their everyday business practices" and established substantial penalties for noncompliance); *National Wildlife Fed'n*, 497 U.S. at 891 ("a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately" is ripe for judicial review).

B. Respondents' Suit Should Be Dismissed Because The Challenged Provisions Of The Wayne LRMP Are Not Ripe For Review

Respondents' second amended complaint alleged that the LRMP for the Wayne National Forest (1) overemphasized timber harvesting at the expense of other uses of the forest (by designating too many acres as suitable for timber harvesting and by setting the ASQ at too high a level), and (2) improperly relied on clearcutting as the predominant method of harvesting. See J.A. 19; pp. 9-10, *supra*. The challenged features of the Wayne LRMP provide programmatic guidance concerning the expected frequency and location of subsequent timber harvesting, as well as the methods of harvesting that are likely to be appropriate for particular areas of the forest. Before any particular timber sale actually goes forward, however, the Forest Service conducts an individualized assessment of its likely environmental consequences, an assessment that is subject to administrative and judicial review. Most significantly, the Forest Service is under no obligation to permit timber harvesting on a particular tract of the forest even if such harvesting would be consistent with the terms of the plan.

Because adoption of the plan provisions at issue here did not commit the Forest Service to undertake any particular timber harvesting project that might in turn harm one of respondents' members, we believe that respondents lack standing to bring a facial challenge to the plan provisions at issue here.[16] In order to establish that their members

[16] Our point, we emphasize, is not simply that the Wayne LRMP fails to list the timber sales that will occur during the life of the plan. Different issues would be raised, for example, if an LRMP *required* that timber harvesting must occur on any tract within the forest that was subsequently determined to satisfy specified criteria. Even if such a plan did not identify the specific sales that would go forward, a plaintiff might be able to show that he used tracts that demonstrably

would suffer injury in fact as a result of timber sales, respondents would be required to show that they utilize areas of the forest that would be affected by the harvesting activities. See *Defenders of Wildlife*, 504 U.S. at 565-566 ("a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it"); *id.* at 594 (Blackmun, J., dissenting); *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 887, 889 (1990); see also *id.* at 902-904 (Blackmun, J., dissenting).[17] At the time the Wayne LRMP was adopted, however, it was unclear where, how often, and in what manner the Forest Service would permit timber harvesting projects within the Wayne National Forest. As a result of that discretion retained by the Forest Service under the existing regulations and Wayne LRMP, it was unclear when the plan was adopted whether any timber harvesting activities ultimately carmet the stated conditions. Under those circumstances, the agency's adoption of the LRMP might be said to render the plaintiff's injury sufficiently likely that Article III standing requirements would be satisfied, even if the agency had not yet issued a formal determination regarding the propriety of harvesting at particular locations. Under the existing statutory and regulatory framework, however, the agency retains discretion not to go forward with a proposed timber sale even if the sale is determined to be consistent with the plan.

[17] The areas "affected by" a particular timber harvesting project most obviously include, but are not limited to, the tracts of land on which harvesting actually occurs. Thus, if timber harvesting near a river could be shown to cause increased sedimentation and consequent damage to water quality, a downstream user of the river could establish injury on that basis. Similarly, a plaintiff who challenges a proposed site-specific action on the ground that it would harm a particular animal species may be able to establish injury by demonstrating impairment of his own observation of or work with animals of that species at other locations, even if he does not visit the tract in question. See *Defenders of Wildlife*, 504 U.S. at 566-567. As a rule, however, a plaintiff could not show what tracts will be affected by timber harvesting activities without identifying the tracts on which harvesting will actually take place.

ried out would affect an area of the forest utilized by one of respondents' members. Accordingly, under the present statutory and regulatory framework, mere adoption of the Wayne LRMP provisions challenged here did not, in itself, sufficiently threaten to cause injury to respondents' members to satisfy Article III standing requirements.[18]

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[18] *Bennett* v. *Spear* is not to the contrary. In *Bennett*, this Court held that plaintiffs who received water from the Bureau of Reclamation had standing to challenge a biological opinion issued by the Fish and Wildlife Service, even though final decisions regarding the allocation of water would be made by the Bureau. See 117 S. Ct. at 1163-1165. The Court explained that, while the Bureau was "technically free to disregard the Biological Opinion and proceed with its proposed action, * * * it [would do] so at its own peril (and that of its employees)," since any "taking" of an endangered species done in a manner inconsistent with the biological opinion would subject agency personnel to substantial civil and criminal penalties. *Id.* at 1165. Because of "the virtually determinative effect of [the Fish and Wildlife Service's] biological opinions," the Court concluded, the plaintiffs' threatened injury (in the form of reduced water availability) was "fairly traceable" to the biological opinion itself. *Ibid.*; see also *id.* at 1164 ("while the Service's Biological Opinion theoretically serves an advisory function, in reality it has a powerful coercive effect on the [Bureau]") (citation and internal quotation marks omitted).

The LRMP provisions at issue here, by contrast, cannot be said to have a "coercive"—much less a "virtually determinative"—effect on the Forest Service's decisions whether to allow timber harvesting at particular locations. To the contrary, the agency may (for a variety of reasons) decline to undertake harvesting activities at a particular location even though they would be fully consistent with the terms of the plan. Indeed, the Chief of the Forest Service took considerable pains, in affirming the Regional Forester's approval of the Wayne LRMP, to emphasize that the plan did not commit the agency to harvest timber in any particular quantity or at any particular location. See pp. 8-9, *supra*. Thus, we do not contend that respondents lack standing simply because the LRMP is not "the very last step in the chain of causation." *Bennett*, 117 S. Ct. at 1164. Our point instead is that the substantial discretion retained by the Forest Service even after the plan's adoption precludes a finding that respondents face "certainly impending" injury, *Whitmore*, 495 U.S. at 158, and that any such injury they may suffer in the future is, at this stage, "fairly traceable" to the LRMP itself.

For several reasons, however, we believe that it would be more appropriate to decide this case on prudential ripeness grounds rather than on Article III standing grounds. First, ripeness doctrine focuses more precisely on questions of *timing*—and, in particular, on questions concerning the propriety of reviewing general agency policies before those policies have been applied to discrete factual settings. Second, this case does not arise under a special statutory review provision in which Congress dispensed with prudential limitations on the exercise of jurisdiction, thereby making it necessary for the Court to define the outer limits of Article III. Compare *Raines* v. *Byrd*, 117 S. Ct. 2312, 2318 n.3 (1997); *Bennett*, 117 S. Ct. at 1162-1163. It arises under the APA, which incorporates prudential ripeness limitations on the power of a reviewing court to grant equitable relief in the form of an injunction or declaratory judgment. See *Catholic Social Services*, 509 U.S. at 57-58; *Abbott Laboratories*, 387 U.S. at 148, 155. The propriety of respondents' facial challenge is therefore most appropriately determined by reference to those limitations under the APA—the Act by which Congress has provided for judicial review of the Forest Service's on-the-ground activities.

Third, and in a related vein, a decision based on prudential ripeness grounds would be consistent with the "fundamental and longstanding principle of judicial restraint [that] requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) (citing, *inter alia*, *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring)). The Court may thereby afford Congress or the Forest Service the opportunity to consider in the first instance whether (and, if so, under what circumstances) certain forest plan provisions should be subject to facial chal-

lenge.[19] That approach would also avoid a holding that might be construed as raising constitutional questions concerning existing statutory provisions that authorize judicial review of regulations or other agency policy judgments prior to their application to a concrete factual setting. See note 14, *supra*.

Finally, the manner in which this case has been litigated would complicate the Court's efforts to resolve the issue of standing. As we noted in our brief in opposition (at 9, 19), neither petitioner nor the government contended in the district court that respondents' claims were not justiciable. See p. 11, *supra*. As a result, respondents were not called upon to submit (and the courts below had no opportunity to consider) evidence clarifying or substantiating their claims of injury to their members. Compare *Bennett*, 117 S. Ct. at 1163-1164; *Defenders of Wildlife*, 504 U.S. at 561.[20] The Court's resolution of the ripeness

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[19] While noting that ripeness doctrine reflects both constitutional and prudential concerns, see, *e.g.*, *Catholic Social Services*, 509 U.S. at 57 n.18, this Court has not attempted to define the precise line of demarcation between the two. We believe that the instant case is most appropriately resolved on prudential ripeness grounds. Because Congress has neither explicitly nor implicitly authorized the assertion of facial challenges to LRMPs, the Court need not determine whether, and under what circumstances, a statutory authorization for facial challenges to various types of provisions in an LRMP would be consistent with Article III. We note, however, that S. 1253, introduced in the Senate on October 3, 1997 (see 143 Cong. Rec. S10,323), would provide, *inter alia*, for judicial review of forest plans, plan amendments, or plan revisions. Section 117 of the bill would expand standing to the full extent permitted by the Constitution and would require that suit be brought within 90 days after the final decision on the administrative appeal of an LRMP, plan amendment, or plan revision. See *id.* at S10,327-S10,328.

[20] Even in the court of appeals, the government stated that it was *not* "claiming that [respondents] ha[ve] failed to show injury by failing to establish use of the geographic area, or that it is too uncertain that [respondents'] members will return to the site." Gov't C.A. Br. 22-23 (footnotes omitted). It is our position here, however, that, if a facial challenge were to proceed, respondents would be required to make allegations (and, on summary judgment, a showing) of their use of particular tracts that they assert would be affected.

question is much less apt to be hindered by any gaps in the evidentiary record. The Court need not assess the likelihood that respondents will ultimately suffer injury as a result of timber harvesting activities in the Wayne National Forest. It need only determine that any such injury, if and when it becomes imminent, can more appropriately be redressed through a challenge to individual timber projects than through a facial attack on the plan itself.

1. The Provisions Of The Wayne LRMP Challenged By Respondents Do Not Authorize Or Require The Forest Service To Undertake Any Site-Specific Activity Without Further Consideration Of Its Environmental Effects

Up to this point, the Forest Service's usual practice has been not to include final decisions regarding individual timber harvesting projects as part of an LRMP. Nothing in the NFMA, however, would foreclose the agency from incorporating such decisions within a forest plan. The Forest Service is currently undertaking a review of the regulatory provisions governing the formulation of LRMPs in order to determine how plans can be used most effectively within the forest management process. See Gov't Br. in Opp. 22-23. To the extent that a particular LRMP incorporates final decisions that are otherwise suitable for immediate judicial review, review is not precluded simply because those decisions are contained within a "plan." See *ibid.*; note 9, *supra*. We therefore do not contend that the instant case should be resolved on the basis of a per se rule that LRMPs are unreviewable. Our position instead is that the plan provisions that are the

subject of respondents' suit are not subject to judicial review in the context of a facial challenge, since they neither require nor authorize the Forest Service to undertake any timber harvesting projects without a further, individualized assessment of likely environmental effects and other considerations.

a. The Forest Service is required, in developing an LRMP for a unit of the national forest system, to identify lands within the forest that are "not suited for timber production." 16 U.S.C. 1604(k).[21] A determination that particular tracts are "suited for timber production," however, does not mean that timber harvesting must actually occur on those tracts, either in the immediate future or during the life of the plan. Economic or other factors, for example, might cause timber to remain uncut. And any proposed timber sale must be preceded by an individualized consideration of its likely environmental consequences before it is carried out, which would furnish an opportunity for the agency to consider and address any objections respondents or their members might have, and perhaps mitigate or eliminate particular environmental harms.

In rejecting the administrative appeals in this case, the Chief of the Forest Service emphasized that the propriety of individual sales would be subject to site-specific inquiries—including consideration of a no-action alternative—in which the public would be given an opportunity to participate. See pp. 7-9, *supra*. Indeed, although the Wayne LRMP designated 126,107 acres within the forest as suited for timber production, it projected that only 7,835 acres would be harvested during the period from

[21] Section 1604(k) provides that, "[i]n developing [LRMPs] pursuant to [the NFMA], the Secretary shall identify lands within the management area which are not suited for timber production, considering physical, economic, and other pertinent factors to the extent feasible." The applicable regulation, 36 C.F.R. 219.14, sets forth the criteria to be considered by the Forest Service in identifying unsuitable lands.

1986 to 1996. Plan 4-180. Thus, both the Plan itself and the Chief's decisions rejecting the administrative appeals refute any suggestion that designation of particular tracts as "suited for timber production" commits the Forest Service to the harvesting of timber in those areas. See also Pet. App. 36a, 37a (district court observes that "[t]he amount of suitable timber base does not represent the amount of timber which will be harvested," and that, "[i]f the suitable timber base exceeds the amount required to meet the timber production goals of the Plan, that appears to be of little consequence except to give the Forest Service greater latitude in determining just where in the forest the timber harvests will occur").[22]

b. Much the same analysis applies to the ASQ established by the LRMP. The ASQ functions solely as a *maximum* and does not commit the Forest Service to allow the harvesting of any particular quantity of timber. See 53 Fed. Reg. 26,832 (1988) (explaining that the ASQ "is the maximum regulated volume of timber that can be sold over the planning period, not necessarily the volume that will be sold"). In rejecting the administrative appeal filed by Citizens Council in this case, the Chief of the Forest

[22] The district court observed that the Wayne LRMP "contemplates that the effects of timber harvesting will be controlled by the design of timber sale areas using standards and guidelines that will adequately protect these resources," and that "a separate environmental analysis will be conducted at the time of any proposed timber sale." Pet. App. 28a, 29a. The court also observed that "[t]he cost of mitigation measures is site-specific. The cost of mitigation measures is borne by the purchaser. If the cost of required mitigation measures at any specific site renders the timber sale unprofitable, then it is safe to assume that it will not occur." *Id.* at 29a (citation omitted). The court thus recognized that, even where a particular tract is designated as suited for timber production, both the Forest Service and the prospective purchaser(s) will consider a variety of site-specific environmental and economic factors before any timber harvesting activities will actually occur.

Service emphasized that the "ASQ in the Forest Plan is the upper limit for timber outputs for the plan period, not actual proposals for timber sales offerings. The Forest Plan makes no promise or assurance that the outputs for any resource, including timber, will actually occur at the projected level." Pet. App. 100a. See also *id.* at 33a (district court observes: "The ASQ does not determine the actual amount of timber which will be sold but sets the upper limit for the plan period. The actual amount of timber sales may be less and will depend on several unpredictable factors.").

c. The plan's projections regarding likely methods of timber harvesting are similarly contingent in nature. The LRMP at issue in this case does not require that clearcutting must occur at all, much less that it must occur at a particular location. As the Chief observed, established Forest Service practice is that "certain specific findings required by NFMA, including determinations on the appropriateness of even-aged management and the optimality of clearcutting, must be made and documented during Forest Plan implementation on a project-by-project basis." Pet. App. 98a-99a. "As the Forest Plan is implemented, the Regional Forester must ensure that alternative cutting methods to meet site-specific conditions and objectives are considered before making a finding that clearcutting is the optimum cutting method." *Id.* at 99a. Thus, while the projections in the LRMP furnish "programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain areas of the forest," they do not commit the Forest Service to utilize clearcutting with any particular frequency or at any particular site. *Id.* at 98a; see also *id.* at 76a.[23]

[23] The Forest Service's management of the Wayne National Forest since the LRMP was adopted confirms that activities *permitted* by a forest plan will not necessarily go forward. As noted above, the ASQ under the LRMP at issue here is 75 million board feet during the first decade of the plan. Forest Service statistics indicate, however, that a total of only 29.8 million board feet of timber was sold in the Wayne National Forest during the years 1988-1996. See Forest Plan Estimates v. Actual Accomplishments (lodged with the Clerk of this Court). Only 2.0 million board feet of timber were sold in the forest during the four-year period from 1993 through 1996. *Ibid.* Although the plan projected that 5,075 acres would be harvested by evenaged management techniques during the first decade, only 1,540 acres were actually so harvested. See Summary of Harvest on Wayne NF from STARS Database (lodged with the Clerk of this Court) (1,434 acres harvested by clearcutting, 106 by shelterwood cutting); see also Pet. 20 n.10; pp. 39-41 & n.30, *infra*.

2. Respondents Cannot Establish The Existence Of A Ripe Controversy Simply By Demonstrating That The Challenged Plan Provisions Will Influence The General Course Of The Agency's Superintendence Of The Wayne National Forest

Respondents have not directly contested the foregoing analysis—*i.e.*, they have not contended that the Wayne LRMP required the Forest Service to undertake any *particular* timber sale or other ground-disturbing activity. Their argument instead is that the plan will substantially influence the overall management of the Wayne National Forest, even if it does not compel any individual project to go forward. We do not dispute the validity of that premise. Because the purpose of an LRMP is to "guide all natural resource management activities" within the affected unit of the national forest system, 36 C.F.R. 219.1(b), the agency's formulation of a forest plan, and its decision to adopt one plan from among competing alternatives, can be expected to affect the nature and extent of the site-specific activities that the Forest Service ultimately selects. Indeed, the commitment of time and resources that the Forest Service devotes to the formulation of LRMPs would be pointless if the terms of the plan were not expected to have a substantial influence on subsequent

decisions addressing particular on-the-ground activities. We do not agree, however, that the respondents have alleged or could allege that the anticipated impact of the challenged plan provisions upon the overall management of the Wayne National Forest provides a sufficient basis for concluding that those provisions are subject to a facial challenge. Rather, under the current statutory and regulatory framework, respondents should be required to challenge individual timber harvesting activities threatening concrete injury to their members, if and when such activities become imminent. Compare *National Wildlife Fed'n*, 497 U.S. at 892-893 & n.3.[24]

Such a regime will not insulate from judicial scrutiny any determinations in the plan that become relevant to any ground-disturbing activities that may later threaten injury to respondents' members. A court's review of individual timber harvesting projects within the Wayne National Forest to determine if they are arbitrary and capricious under the APA will include consideration and evaluation of any programmatic guidance contained in the LRMP that bears on the propriety of an individual project decision. See *Sierra Club* v. *Robertson*, 28 F.3d 753, 759 (8th Cir. 1994) (a plaintiff who will be injured by a proposed site-specific activity "may assert that the proposed site-specific action is not consistent with the Plan, or that the Plan as it relates to the proposed site-specific action is inconsistent with the governing statutes, or both"); *Wilderness Society* v. *Alcock*, 83 F.3d 386, 390 (11th Cir. 1996) (noting government's concession that the plaintiff in a suit concerning a site-specific activity "can challenge both the site-specific action as well as the Plan-level decision(s) underlying the specific action"). For a variety of reasons, that mode of review is more consistent with the governing statutory and regulatory framework and general principles of justiciability than is adjudication of respondents' facial challenge to the LRMP itself.

[24] Respondents' second amended complaint was filed June 22, 1993, see J.A. 12—nearly five and one half years after the Forest Service adopted the Wayne LRMP. Thus, the agency had undertaken a substantial range of site-specific activities (including timber harvesting) pursuant to the plan *before* the second amended complaint was filed. That fact renders all the more significant respondents' failure to file suit to challenge *any* specific timber harvesting activities causing or threatening injury to their members.

a. This Court has held that

> a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.

National Wildlife Fed'n, 497 U.S. at 891. An LRMP, like a regulation, is a "final agency action" that typically represents the culmination of a lengthy decisionmaking process within the government and can be expected to influence the agency's conduct in the future. As with a forest plan, moreover, the process by which agency regulations are formulated typically involves substantial public participation. Compare 16 U.S.C. 1604(d) (Forest Service is required to "provide for public participation in the development, review, and revision of [LRMPs]") with 5 U.S.C. 553 (notice and comment rulemaking).[25] This

[25] As the district court observed, "the development of an [LRMP] proceeds through a series of steps which ensure public involvement at each stage of the planning process." Pet. App. 12a. In developing the Wayne LRMP and selecting the plan actually adopted from among seven alternatives, the Forest Service received and analyzed over 1,500 written comments from members of the public. *Id.* at 13a.

Contrary to the court of appeals' suggestion (see Pet. App. 4a), our position that respondents' facial challenge is nonjusticiable is in no

Court's decision in *National Wildlife Federation* is best understood as recognizing a background presumption that a general agency policy is not ordinarily ripe for judicial review until it is applied to a concrete factual setting.

That presumption can, however, be overcome, in situations in which the promulgation of a rule or other final agency action of general applicability "will itself affect parties concretely enough to satisfy [the ripeness] requirement, as it did in *Abbott Laboratories* itself," where "the promulgation of the challenged regulations presented plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." *Catholic Social Services*, 509 U.S. at 57; see *id.* at 57-59; *National Wildlife Fed'n*, 497 U.S at 891-892. So, too, we believe that, in appropriate circumstances, the agency concerned may properly determine under applicable procedures that a regulation or other final agency action of comparable import is sufficiently definitive in its impact on private parties to permit immediate judicial review of the provision without exhausting administrative remedies available with respect to a particularized application of the provision. Compare *Weinberger* v. *Salfi*, 422 U.S. 749, 765-767 (1975). In this case, however, respondents have not alleged that the plan provisions they challenge in themselves cause the sort of hardship to respondents' members that this Court's cases have required, and, under its current regulations, the Forest Service has not made the sort of

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way inconsistent with the NFMA's mandate of broad public participation in the formulation of LRMPs. Because the protection of the *public* interest is entrusted to the political branches, see *Defenders of Wildlife*, 504 U.S. at 576, it is appropriate that the Forest Service solicit and consider the views of all persons who are concerned about the manner in which the Wayne National Forest is managed. Persons who invoke the jurisdiction of a federal *court*, by contrast, must establish a more tangible and immediate interest in the outcome of a dispute.

determination discussed above concerning the propriety of dispensing with exhaustion of the administrative procedures that are available for site-specific activities.

b. The Forest Service is required by statute to provide opportunities for public notice and comment, along with a right of appeal, for "proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans." Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, § 322, 106 Stat. 1419 (1992) (16 U.S.C. 1612 note). The statutory scheme makes clear that the agency's final decision to undertake a timber sale is subject to a separate opportunity for administrative review, and to judicial review under the APA. See note 3, *supra*. Congress has also required that "a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction" against Department of Agriculture defendants. Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, Tit. II, § 212(e), 108 Stat. 3211. Thus, respondents would be required by statute to exhaust available administrative remedies before filing suit to challenge any proposed timber sale within the Wayne National Forest. That requirement would be subverted if respondents were permitted to file a facial challenge to the plan itself. Cf. *Heckler* v. *Ringer*, 466 U.S. 602, 621-622 (1984) (plaintiff cannot circumvent exhaustion requirement applicable to claims for Medicare reimbursement by filing a declaratory judgment action to challenge agency rules governing reimbursable expenses).

The availability of an administrative appeal procedure, together with the requirement that administrative remedies be exhausted as a prerequisite to judicial review, ensures that members of the public who may be affected

by proposed timber harvesting activities can bring any objections to the attention of the Forest Service before the agency renders a final decision. The administrative appeal process can be expected to obviate the need for judicial review in some cases (when the administrative appeal results in a decision not to go forward with the contemplated action),[26] and to ensure that any judicial review that does take place is based upon a well-developed administrative record. See *Weinberger* v. *Salfi*, 422 U.S. at 765 (administrative exhaustion requirements serve to "prevent[] premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review").

Thus, while a court in reviewing individual timber harvesting activities may assess the rationality of any pertinent programmatic guidance (see pp. 32-33, *supra*), the record before the court in such a suit will never be limited to the LRMP itself. A reviewing court will consider as well the manner in which that guidance has been applied to a particular project, including the agency's analysis of relevant site-specific factors. Even where forest plan provisions ultimately become the subject of judicial scrutiny, the court's review is therefore likely

[26] Since the approval of the Wayne LRMP, respondents have twice pursued successful administrative appeals challenging proposed site-specific timber harvesting activities in the Wayne National Forest. In decisions issued November 20, 1992, the Forest Supervisor concluded on each appeal that the relevant decision documents did not adequately justify the conclusion that clearcutting was the optimal method of harvest for the site in question. See Appeal Nos. 92-09-11-0008, 92-09-11-0009 (lodged with the Clerk of this Court). Thus, respondents' own experience confirms that proposed timber sales, even if consistent with the plan, will be subject to meaningful site-specific analysis before they are allowed to go forward.

to be more focused and better informed if the plan is considered in its application to a particular project, rather than in the abstract setting of a facial challenge. Compare, *e.g.*, *Toilet Goods Ass'n*, 387 U.S. at 164 ("judicial appraisal of [the relevant] factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here").[27]

[27] To the extent that the nature and effect of a particular plan provision are unclear—*i.e.*, insofar as it is uncertain whether or to what extent the plan provision will "drive" subsequent site-specific activities—that uncertainty is itself a reason to postpone judicial review. Once the Forest Service announces and explains a particular site-specific decision, a court can more confidently determine whether (and if so, in what way) the agency regards the plan provision as having some binding effect in individual decisions concerning particular timber harvesting projects, and to what extent the plan provision will be determinative with respect to whether and in what manner the proposed project will be carried out. Because the agency's construction of its own forest plan would be entitled to deference, cf., *e.g.*, *Martin* v. *OSHRC*, 499 U.S. 144, 150 (1991) ("It is well established that an agency's construction of its own regulations is entitled to substantial deference.") (internal quotation marks omitted), it is particularly appropriate that judicial review should take place in a context in which the plan has been construed and applied to a concrete on-the-ground decision.

The District of Columbia Circuit confronted an analogous problem in *American Trucking Ass'ns* v. *ICC*, 747 F.2d 787 (1984) (Scalia, J.). The court concluded that petitioners' challenge to an Interstate Commerce Commission policy statement was not ripe for review. The court explained that ripeness doctrine serves, *inter alia*, to safeguard the interests of the judiciary by (1) "protecting [the court] from adjudicating matters that are not sufficiently 'fleshed out' that [it] may see the concrete effects and implications of" its decision, and (2) "protecting [the court] from adjudicating matters that in fact make no difference and are a waste of [its] resources." *Id.* at 789-790. The court observed that "[a]t most the policy statement means that *future* actions of the Commission * * * may be damaging to the petitioners—but that prospect in no way affects any action they must take or should take at the present time." *Id.* at 790. It also noted that the policy statement was to some degree ambiguous, and that its precise role in the

c. A regime under which judicial review is focused upon specific timber harvesting decisions also serves to ensure that any relief the court may order can be narrowly tailored to redress the plaintiff's own injury. See *Lewis* v. *Casey*, 116 S. Ct. 2174, 2183 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established."); see also *id.* at 2183-2184 & n.6.[28] By contrast, if a plan-level challenge is permitted to go forward based upon the prediction that some *unidentified* site-specific action that may be taken under the Wayne LRMP in the future might eventually injure one of respondents' members, the precise nature of that injury, and thus the proper scope of any relief, will be unknowable. Any remedial order entered in such a

agency's decisionmaking process would be clarified if judicial review were focused on a concrete application of the policy to a particular decision. *Ibid.* All of those concerns are applicable here.

[28] The practical consequences of a judicial order may, we acknowledge, extend beyond the particular on-the-ground action that is the subject of the court's review. Thus, if the court enjoins a particular timber sale because programmatic guidance contained in the LRMP and adhered to in the site-specific decision is arbitrary or contrary to law, that ruling may have preclusive effects in subsequent litigation between the parties involving other timber sales. A comparable appellate court ruling may have a stare decisis effect that will, as a practical matter, be dispositive of future suits involving different plaintiffs in which the validity of the programmatic guidance is called into question. Compare *National Wildlife Fed'n*, 497 U.S. at 894 (judicial review of individual agency actions "may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency in order to avoid the unlawful result that the court discerns"). And quite apart from any legally binding consequences that a judicial decree may have, the Forest Service may seek of its own accord to eliminate a purported programmatic flaw, either by amending the plan or by tailoring subsequent site-specific activities to meet the court's concerns. It nevertheless remains the case that the court's remedial decree—and, in particular, the scope of any injunctive relief—should extend no further than is necessary to redress the injury to the plaintiff resulting from the challenged site-specific activity.

suit could have no more than a fortuitous relationship to the injury that respondents would actually have suffered over the life of the plan.[29]

Thus, in contending that respondents' facial challenge to the Wayne LRMP is not ripe for adjudication, our point is not that respondents should have brought essentially the same lawsuit at a later point in time. If respondents sought to challenge an individual timber harvesting activity, they would be required to exhaust administrative remedies with regard to that decision; the court's review would be limited to those plan provisions bearing on the propriety of the contested decision; and the relief (if the suit was successful) would be confined to setting aside the decision and preventing respondents from suffering actual or imminent harm. Respondents should not be permitted to evade those limitations by filing suit before any concrete injury has materialized.

d. In rejecting respondents' administrative appeals, the Chief of the Forest Service took pains to emphasize that the LRMP did not incorporate binding decisions to undertake individual timber sales; that respondents (and other private parties) would have opportunities to participate in the agency's decisionmaking processes regarding individual sales; and that actual outputs might therefore diverge from the projections in the plan. See pp. 7-9, *supra*.

[29] A particularly troubling aspect of respondents' second amended complaint is its request for relief, which seeks, *inter alia*, "an injunction prohibiting further timber sales and clearcutting until the plan and its environmental impact statement are revised." J.A. 24. It is wasteful, to begin with, to be forced to litigate the reasonableness of LRMP projections that have manifestly failed to materialize. See note 23, *supra*; pp. 39-41, *infra*. But any illegality or capriciousness in those projections, even if proved, surely could not justify a prohibition on *all* timber harvesting in the forest. The inappropriateness of such relief is made all the more vivid in this case by the fact that respondents have not filed suit to challenge any individual timber sale that has occurred in the Wayne National Forest during the last decade.

Shortly after the initial complaint in this case was filed, the Chief issued policy guidance that was intended "to reduce clearcutting on National Forest System lands." See Memorandum from F. Dale Robertson to Regional Foresters and Station Directors, Re: Ecosystem Management of the National Forests and Grasslands, Attach. 2 (June 4, 1992). That policy guidance limited clearcutting to specified circumstances, and the Chief forecast that "[t]his clearcutting policy combined with the new USDA-Forest Service ecosystem management can reduce clearcutting by as much as 70 percent from FY 1988 levels." *Ibid.* (We have lodged a copy of that policy guidance with the Clerk of this Court.) As a result of respondents' plan-level challenge, however, the Forest Service was called upon to defend in the courts below projections that had been substantially superseded by the new policy adopted at the national level.[30]

By awaiting final agency decisions concerning proposed timber sales, the courts can prevent the expenditure of time and resources on needless litigation concerning projected activities that may ultimately fail to materialize. In this case, respondents challenged, and the court below reviewed, tentative determinations and projections concerning timber harvesting generally, and clearcutting in particular, that had currency at the time the plan was adopted, but that do not reflect the agency's current management practices in the Wayne National Forest. See also note 23, *supra* (noting divergence between Wayne LRMP projections and actual outputs). The Forest Service and the courts should not be forced to divert their scarce resources from addressing current matters having concrete effect in order to litigate such abstract questions of past history.

[30] Intervening statutory changes also altered the range of options lawfully available to the agency. Since 1991, each congressional appropriation for the Forest Service has provided that no appropriated funds "shall be used for timber sale preparation using clearcutting in hardwood stands in excess of 25 percent of the fiscal year 1989 harvested volume in the Wayne National Forest, Ohio." See Pub. L. No. 101-512, Tit. II, 104 Stat. 1942; Pub. L. No. 102-154, Tit. II, 105 Stat. 1018; Pub. L. No. 102-381, Tit. II, 106 Stat. 1401; Pub. L. No. 103-138, Tit. II, 107 Stat. 1403; Pub. L. No. 103-332, Tit. II, 108 Stat. 2524; Pub. L. No. 104-134, Tit. II, 110 Stat. 1321-185; Pub. L. No. 104-208, Div. A, Tit. II, 110 Stat. 3009-208; Pub. L. No. 105-83, Tit. II, 111 Stat. 1576-1577.

e. "[T]he test of ripeness * * * depends not only on how adequately a court can deal with the legal issue presented, but also on the degree and nature of the [challenged action's] present effect on those seeking relief." *Toilet Goods Ass'n*, 387 U.S. at 164. Respondents would suffer no significant hardship by deferral of their legal challenge until the point at which the contested provisions threaten imminent on-the-ground consequences. The LRMP provisions challenged here do not, for example, "require[] an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Abbott Laboratories*, 387 U.S. at 153; see also *Catholic Social Services*, 509 U.S. at 57-59. The absence of any substantial prejudice to the respondents reinforces the conclusion that their plan-level challenge ought not to have been adjudicated.

3. The Affidavits Submitted By Respondents In The District Court On Remand Do Not Render Respondents' Plan-Level Challenge Suitable For Adjudication

The court of appeals in this case reversed the order of the district court granting summary judgment for the government and remanded the case for further proceedings. While the petition for a writ of certiorari was pending in this Court, respondents filed a renewed motion for summary judgment in the district court and attached affidavits of three of their members addressed to the issue of standing. Two of the affidavits stated that ongoing timber projects, temporarily put on hold, had been

scheduled for specific areas of the forest utilized by the affiants. See p. 14, *supra*; Sierra Club/Citizens Council Br. in Opp. 10-11. Respondents contend (see *id.* at 10-14) that those developments render their plan-level challenge suitable for adjudication whether or not it was previously justiciable. That claim is without merit.

Even assuming, *arguendo*, that respondents' affidavits are properly before this Court, nothing in those affidavits affects the justiciability of their plan-level challenge.[31] If the Forest Service has reached a final decision regarding the sales in question, the sales themselves would be ripe for judicial review. A plaintiff who has adequately alleged injury in fact resulting from the sales, and who has satisfied applicable exhaustion requirements (see p. 35, *supra*),[32] would be entitled to seek judicial review of those

[31] We are perplexed by respondents' suggestion (see Sierra Club/Citizens Council Br. in Opp. 11-12, 14) that the existence of timber harvesting under the Wayne LRMP represents a change in circumstances that has occurred since the case was submitted to the court of appeals. Timber has been harvested in the Wayne National Forest throughout the life of the plan, though at a volume substantially less than initially projected. Perhaps respondents mean that the sales identified in their brief in opposition are the first sales under the plan to threaten concrete injury to their members. That would be consistent with the affidavits themselves, which indicate that the affiants are generally satisfied with the current condition of the Wayne National Forest. See Affidavit of David A. Scott at 2 ("Sierra Club outings leaders favor national forest property like the Wayne for several reasons: the aesthetic pleasure of hiking or camping in a large swath of old, unspoiled forest; the educational value of visiting an area with a variety of trees; and the recreational possibilities afforded by the lack of restrictions on our use of national forest lands"); Affidavit of Stephen J. Ostrander at 3 ("I have traveled extensively in Ohio's natural world, and can safely say that few places in this state can match the [Wayne National Forest's] abundance for solitude, isolation and room for roughing it").

[32] The affidavits submitted to the district court on remand do not suggest that either the respondent organizations or the individual affiants have exhausted their administrative remedies with respect to the sales in question.

site-specific actions. The reviewing court could consider any aspects of the plan that bear on the propriety of the individual sales. A plaintiff could not, however, bring the entire plan before the court simply by identifying a single site-specific action that had caused him injury. See *Lewis*, 116 S. Ct. at 2183.[33]

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE LRMP AT ISSUE IN THIS CASE WAS INCONSISTENT WITH LEGAL REQUIREMENTS

The court of appeals held that the LRMP for the Wayne National Forest was arbitrary and capricious because it "would utilize even-aged management logging as if it were the statutory rule, rather than the exception." Pet. App. 6a. In the view of the court of appeals, the Wayne LRMP's projections concerning the anticipated use of evenaged management violated a purported NFMA requirement that "even-aged management techniques will be used only in exceptional circumstances." *Ibid.* In support of that proposition, the court relied (see *ibid.*) on 16 U.S.C. 1604(g)(3)(F)(v), which states that evenaged management techniques must be "carried out in a manner consistent with the protection of soil, watershed, fish, wildlife, rec-

[33] Respondents contend that both the Eighth and Eleventh Circuits "have made it clear that once ground-level projects are begun pursuant to a forest plan, there is no question that challenges to a forest plan by individuals or groups affected by the ongoing projects are justiciable." Sierra Club/Citizens Council Br. in Opp. 13. That is incorrect, or at least overbroad. Both those courts of appeals have recognized that judicial review of a site-specific action may include scrutiny of any programmatic guidance that bears on the Forest Service's decision to undertake that particular project. See *Robertson*, 28 F.3d at 759; *Alcock*, 83 F.3d at 390; pp. 32-33, *supra*. But neither court suggested that the plan may be reviewed and set aside in its entirety simply because the plaintiff has established injury in fact resulting from a single site-specific action.

reation, and esthetic resources, and the regeneration of the timber resource."

The Sixth Circuit did not explain its determinations that evenaged management techniques may be employed "only in exceptional circumstances," and that the Forest Service had improperly "utilize[d] even-aged management logging as if it were the statutory rule, rather than the exception." Pet. App. 6a. The court of appeals' disapproval of the Wayne LRMP may have been based on the fact that the plan "provide[d] for even-aged management on 80% of the suitable forest land." ROD 18; see Pet. App. 2a ("The plan designated that eighty percent of all timbering techniques would be 'even-aged management'"); p. 6 & n. 5, *supra*. The court's opinion could thus be read to hold that a forest plan which identifies evenaged management as the anticipated primary method of timber harvesting is *ipso facto* violative of the NFMA. Alternatively, the court's reference to "exceptional circumstances" could be construed as essentially a restatement of the statutory requirement that use of evenaged management must be premised on specific findings that are not required for unevenaged techniques. See 16 U.S.C. 1604(g)(3)(F). In asserting that the Wayne LRMP employed evenaged management "as if it were the statutory rule," the court of appeals might simply have meant that the agency had failed adequately to support its projection that a substantial majority of the suitable acreage could appropriately be harvested through the use of evenaged methods. Under either reading of the opinion, the court of appeals' decision was in error.

A. Nothing In The National Forest Management Act Prohibits The Forest Service From Using Evenaged Management As The Primary Method Of Timber Harvesting Within A Particular Forest

In *Sierra Club* v. *Espy*, 38 F.3d 792, 799 (1994), the Fifth Circuit stated that

> the Forest Service may use even-aged management as an overall management strategy. That even-aged management must be the optimum or appropriate method to accomplish the objectives and requirements set forth in an LRMP does not mean that even-aged management is the exception to a rule that purportedly favors selection management. Similarly, the requirement that even-aged logging protect forest resources does not in itself limit its use. Rather, these provisions mean that the Forest Service must proceed cautiously in implementing an even-aged management alternative and only after a close examination of the effects that such management will have on other forest resources.

After reviewing the Act's legislative history, the Fifth Circuit concluded that the "NFMA does not bar even-aged management or require that it be undertaken only in exceptional circumstances; it requires that the Forest Service meet certain substantive restrictions before it selects even-aged management." *Id.* at 800.

The Fifth Circuit's resolution of the issue is clearly correct. Nothing in the NFMA can plausibly be construed to require that unevenaged management must be used as the predominant method of timber harvesting, either within a particular forest or in the National Forest system as a whole. Rather, the statute requires that evenaged management be "carried out in a manner" that is "consistent" with protection of various resources and regeneration of the timber resource. 16 U.S.C.

1604(g)(3)(F)(v). If that standard is satisfied with respect to each use of evenaged techniques, the NFMA imposes no numerical limit on the percentage of timber that may be harvested through the use of evenaged methods.

B. The Forest Service Adequately Explained And Supported The Timber Harvesting Projections Contained In The Wayne LRMP

As we explain above, formulation of an LRMP is simply one part of the process by which the Forest Service makes timber harvesting decisions applicable to a particular unit of the National Forest system. After the plan is adopted, the agency proposes specific timber sales and harvest methods and conducts inquiries into the likely environmental consequences of each proposal. If this Court concludes that the LRMP provisions at issue here are properly subject to facial challenge, judicial review must still take account of the plan's role in the overall decisionmaking scheme. Thus, a reviewing court would inquire whether the Forest Service has adequately explained and supported the necessarily tentative plan projections that are the subject of respondents' challenge —not whether the agency has undertaken the complete analysis for determining whether each individual timber harvesting activity will actually go forward.[34]

[34] The NFMA requires the Forest Service to ensure that specified criteria have been met before employing various forms of evenaged management. See 16 U.S.C. 1604(g)(3)(F)(i)-(v). The NFMA does not state, however, that the requisite determinations must be made at the plan level. In rejecting the administrative appeal filed by Citizens Council in this case, the Chief of the Forest Service emphasized that, under longstanding agency practice, "certain specific findings required by NFMA, including determinations on the appropriateness of evenaged management and the optimality of clearcutting, must be made and documented during Forest Plan implementation on a project-by-project basis." Pet. App. 98a-99a. There is consequently no basis for respondents' contention that the Wayne LRMP is arbitrary or unlawful because "the plan lacks site-specific determinations that clearcutting is

In the instant case, the district court addressed and rejected respondents' challenges to the policy determinations reflected in the plan, while noting that questions concerning the application of general policies to particular circumstances could be "deferred until there is a proposal of a specific timber sale at a specific site." Pet. App. 19a. The administrative record supports the agency's projections concerning the harvesting methods that appeared likely to be appropriate for various areas of the forest. The fact that those projections have to a significant degree failed to materialize does not mean that the projections were arbitrary when made; it simply shows that the Forest Service's overall decisionmaking process provides mechanisms for ensuring that changed circumstances are taken into account in applying programmatic guidance to individual project decisions over the life of the plan.

Appendix C of the Wayne LRMP, which describes the "management prescriptions" assigned to various areas of the forest, discusses in detail the harvest methods to be considered in planning timber sales, and the expected results and consequences from the use of each method. Appendix C also sets forth the criteria for choosing among the available harvest methods, and identifies the methods that are likeliest to achieve the goals of each management prescription and forest type. Based on the desired and expected condition of the forest following a harvest, Appendix C predicts whether clearcutting or shelterwood cutting is likely to be the best harvest method for each forest type found on the Wayne for which evenaged management is projected. For example, it states that "[c]learcutting is optimum to regenerate the yellow poplar type because it is the only method which provides

the 'optimal' method of harvesting timber in the Wayne." J.A. 19 (second amended complaint).

sufficient light to achieve adequate stocking and growth of yellow poplar." Plan App. C-6. For the oak-hickory type, it states that clearcutting is the optimum method for regenerating high-quality stands and lists a variety of factors supporting its conclusion. *Id.* at C-6 to C-7. The court of appeals did not address those explanations or offer any basis for concluding that the Forest Service had failed to justify the projections contained in the plan.

The Forest Service developed seven alternative plans that would use the available resources in various combinations to address issues of concern to the public. See Draft EIS (DEIS) App. B, Pt. 7. The objective of that process was to identify a plan that would provide maximum long-term public benefits in an environmentally sound manner. DEIS B1-2. The Forest Service analyzed various management scenarios providing a full range of multiple-use opportunities, including dispersed and developed recreation, wildlife habitat, and a variety of timber products. DEIS Ch. 4. The "preferred alternative" selected by the Forest Service reflected a reduction (as compared to the previous pre-NFMA timber management plan for the Wayne National Forest) both in the land area determined to be "suited for timber production" and in the amount of timber that would be produced, and an increase in the amount of land set aside for semi-primitive, non-motorized recreation. See Final EIS (FEIS) H-13; DEIS 2-50, B3-39. It was selected as the alternative likely to provide the best balance of various goods, services, and amenities, including recreational opportunities, development of natural forest conditions and habitat, and timber. ROD 3-4.

After receiving public comment on the draft plan and EIS, the Forest Service further reduced the timber production projections (FEIS 1-20; ROD 19); further increased the amount of land to be managed for semi-primitive non-motorized recreation (ROD 11), "natural

forest" and potential research natural areas (FEIS 1-3); expanded species protection measures to include standards and guidelines for "species of concern" in addition to threatened and endangered species (*ibid.*; ROD 16-17); and added construction of 10 miles of hiking trail (FEIS 1-3). The FEIS explained its rationale for those changes. See FEIS 1-2 to 1-4.

The court of appeals asserted that "the Forest Service has a history of preferring timber production to other uses," and that "forest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse." Pet. App. 7a. The court's allegation of bias is extraordinary in two respects. First, the court identified no evidence that improper bias had tainted the Forest Service's development of the Wayne LRMP, but directed its indictment at the agency as a whole. The record in this case provides no basis on which the court of appeals could evaluate the Forest Service's overall management of the National Forest system; nor is such an evaluation an appropriate exercise of judicial power. Second, the court's allegation of improper bias was based in substantial measure on its perception that various *statutory* provisions created incentives for the Forest Service to act in what the court believed to be inappropriate ways. *Id.* at 7a-8a; see Pet. 14-15. It is bizarre, however, to suggest that an agency displays improper bias by acting in a manner consistent with the pertinent statutory scheme. The courts "generally accord Government records and official conduct a presumption of legitimacy." *United States Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991). The court of appeals offered no cogent explanation for departing from that practice here.

In short, the Forest Service adequately explained and supported the determinations made in the LRMP re-

garding the emphasis to be placed on timber harvesting generally and the methods of harvesting that were deemed likely to be appropriate for various areas of the forest. Although the agency's actual management of the Wayne National Forest has diverged substantially from the projections contained in the plan, that divergence does not cast doubt on the rationality of the LRMP itself. It simply reflects the fact—recognized by the Chief of the Forest Service at the time he affirmed the Regional Forester's decision to approve the plan, see pp. 7-9, *supra*—that the LRMP never purported to set forth final, binding decisions regarding the individual timber sales to be undertaken during the life of the plan. Thus, if this Court holds that respondents' facial challenge to the Wayne LRMP is justiciable, the court of appeals' decision should be reversed on the merits.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss on the ground that respondents' suit is unripe and therefore nonjusticiable. In the alternative, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

vs.

SIERRA CLUB, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Is a forest plan challenge justiciable where frequent forest users challenge the plan's definitive multiple use determination and binding zoning regime?

2. Did the Sixth Circuit Court of Appeals correctly find the Wayne National Forest Plan arbitrary and capricious because it undervalues wilderness recreation, ignores logging's adverse impact on such recreation, and instead commits the forest to providing recreational and logging opportunities that are already prevalent in the region?

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No. 97-16

In The

Supreme Court of the United States

October Term, 1997

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

vs.

SIERRA CLUB, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case challenges the multiple use determination and zoning regime established for the Wayne National Forest in the forest plan adopted under the National Forest Management Act ("NFMA"), 16 U.S.C. § 1604. Specifically, plaintiffs claim that the plan's multiple use determination arbitrarily undervalued wilderness recreation, which is in short supply in southeastern Ohio, and instead committed to create timber and motorized recreational opportunities, which are already prevalent in the region. As a result of this error, the plan zones the forest in a way that fails to set aside sufficient areas to meet the public demand for wilderness recreation and that subjects the remaining, unprotected areas

to numerous activities, such as motorcycle trail use, extensive road networks, and logging, which interfere with plaintiffs' ability to enjoy undisturbed backcountry recreation. To understand why this case is both justiciable and meritorious, it is necessary to review the NFMA forest plan scheme, in general, and the Wayne forest plan, in particular.

I. FOREST PLANS

A. NFMA's Public Forest Planning Process Produces An Integrated Forest Plan Based On A Multiple Use Determination.

A tension between preserving pristine natural forests and logging has pervaded forest management since the inception of the national forest system. In the late nineteenth century, soon after it established the first forest reserves, Congress resolved a dispute over whether to permit commercial timber sales by delegating broad authority to the federal agency managing the national forests. *See* Organic Act of 1897, ch. 2, 30 Stat. 34-36 (current version at 16 U.S.C. §§ 473-482, 551).

Following World War II, both timber production and recreational use of national forests increased markedly. Anderson & Wilkinson, *Land & Resource Planning in the National Forests*, 64 Oregon L. Rev. 1, 28-29, 321-24 (1985). Congress responded to these competing demands by enacting the Multiple-Use Sustained-Yield Act of 1960 ("MUSYA"), 16 U.S.C. §§ 528-531. The Act directs the Forest Service to manage the national forests not simply for timber production, but also for uses with non-economic benefits, such as recreation, wildlife, watershed protection, and fish. Despite the MUSYA mandate, the Forest Service continued to expand both logging and the method of logging known as clearcutting, which removes all trees in a large block. The controversy surrounding clearcutting soon found its way into

the courts, reaching a crescendo when the Fourth Circuit held that the practice violated the Organic Act. *West Virginia Div. of the Izaak Walton League v. Butz*, 522 F.2d 945 (4th Cir. 1975).

Congress' response to this continuing tension was NFMA, which restricts Forest Service discretion to embark on intensive logging regardless of environmental impacts. Under NFMA, each national forest must protect watershed conditions, soil productivity, and biological diversity, and may allow clearcutting only if it is the optimum logging method. 16 U.S.C. § 1604(g)(3)(E)(i) & (F)(i).

Of particular relevance to this case, NFMA establishes an orderly, public process for reconciling competing demands for use of each national forest. *Id.* § 1604(d)-(g); 36 C.F.R. §§ 219.6, 219.12. The forest plan (called a Land and Resource Management Plan ("LRMP")) is the vehicle for striking the multiple use balance among competing demands for commercial exploitation, recreation, and the ecological needs of wildlife, watersheds, and forest habitat. 16 U.S.C. § 1604(a), (e). Each forest plan must make a multiple use determination "that maximizes long term net public benefits in an environmentally sound manner." 36 C.F.R. 219.1(a). The plan then converts this determination into a zoning regime, binding standards, and objectives that control and drive forest activities. 16 U.S.C. § 1604(b); 36 C.F.R. §§ 219.1(b), 219.11.

In developing forest plans, the Forest Service must "use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences." 16 U.S.C. § 1604(b), (f)(1) & (3). This approach recognizes that "the National Forests are ecosystems and their management for goods and services requires an awareness and consideration of the interrelationships among plants, animals, soil, water, air, and other environmental factors within such ecosystems." 36

C.F.R. § 219.19(b)(3). NFMA's comprehensive forest plan approach stands in stark contrast to the previous practice of developing separate plans for each major type of forest use. Anderson & Wilkinson, *supra*, at 31.

The NFMA forest planning process requires substantial public input. 16 U.S.C. § 1604(d); 36 C.F.R. §§ 219.1(b)(11), 219.6, 219.12. Most significantly, the Act merges into one integrated decisionmaking process NFMA's multiple use determination and preparation of an environmental impact statement under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332. *See* 16 U.S.C. § 1604(g)(1); 36 C.F.R. §§ 219.10(a), 219.12. The environmental impact statement must assess a broad range of reasonable alternatives that reflect different mixes of forest uses. 36 C.F.R. §§ 219.4(b)(3), 219.10(b), 219.12. Based on the final environmental impact statement, the Regional Forester must compare the plan endorsed by the Forest Supervisor to alternatives that are environmentally preferable or more cost effective. *Id.* §§ 219.4(b)(3), 219.10(c), 219.12(i)-(j). The Regional Forester then decides whether to approve the proposed plan. *Id.* §§ 219.4(b)(3), 219.12(j).

The approval, amendment, or revision of a forest plan is subject to an administrative appeal in accordance with prescribed regulatory procedures. *Id.* §§ 217, 219.10(d).[1] The NFMA regulations state that a forest plan administrative appeal decision is "the final administrative decision of the Department of Agriculture," and that, by adhering to these procedures, "appellants and intervenors shall be deemed to

[1] The NFMA regulations have long afforded administrative appeals for both forest plans and individual projects. Congress provided statutory direction for the project appeal process in Department of Interior & Related Agencies Appropriations Act of 1993, Pub. L. No. 102-381, § 322, 106 Stat. 1419 (1992) (16 U.S.C. § 1612 note), but did not alter or undermine the forest plan administrative appeal regulations.

have exhausted their administrative remedies for purposes of judicial review." *Id.* § 217.17(g); *see also id.* § 217.18 (failure to pursue a plan appeal renders judicial review premature and inappropriate).

Forest plans adopt a legally binding zoning regime and rules that govern management of the particular national forest. 16 U.S.C. § 1604(b). The plans "guide all natural resource management activities and establish management standards and guidelines for the National Forest System." 36 C.F.R. § 219.1(b). All site-specific activities in the forest must comply with the forest plan; if a site-specific activity is not consistent with the plan's zoning and rules, it cannot go forward. 16 U.S.C. § 1604(i) ("[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans"); *accord* 36 C.F.R. §§ 219.10(e), 223.30, 223.39, 223.40.

Forest plans must be revised every ten or, at the most, 15 years. 16 U.S.C. § 1604(f)(5); 36 C.F.R. § 219.10(g). A plan may be revised earlier to respond to significant changes in forest conditions, public demands, or new agency policies or direction. Short of a full-blown revision, plans may be amended during their life to respond to less drastic changes, such as reductions in appropriated funds. 16 U.S.C. § 1604(f)(4); 36 C.F.R. § 219.10(e)-(f). Revisions and significant plan amendments must be adopted in accordance with the NFMA process for developing forest plans. 16 U.S.C. § 1604(f)(4)-(5); 36 C.F.R. § 219.10(f)-(g).

B. The Forest Plan Multiple Use Determination Strikes A Balance Among Competing Demands And Superimposes A Zoning Regime On The Forest.

The heart of forest plan development is a three-stage suitability determination – NFMA's formula for striking the

balance among competing multiple uses of the forest. 16 U.S.C. § 1604(g)(2)(A), (k). The first stage identifies lands that are physically suitable for timber production. Areas assigned to certain environmentally protective regimes, such as wilderness, historic preservation sites, and research areas reflecting natural habitat conditions, are automatically off-limits to timber production. 36 C.F.R. §§ 219.14(a)(4) & (c)(1), 219.25. Other lands must be deemed physically unsuitable if logging using available technology will cause excessive damage to soils, water conditions, or fish habitat, 16 U.S.C. § 1604(g)(3)(E)(i), (iii); 36 C.F.R. § 219.14(a)(2), or if the lands cannot be restocked with trees within five years of the logging. 16 U.S.C. § 1604(g)(3)(E)(ii); 36 C.F.R. § 219.14(a)(3).

The second stage of the suitability analysis, which applies to those lands found to be physically suitable for timber production, consists of a strictly monetary comparison of "the direct costs of growing and harvesting trees . . . to the anticipated receipts to the government" from timber sales. 36 C.F.R. § 219.14(b). However, lands may not be designated for logging simply because logging results in the greatest dollar return. 16 U.S.C. § 1604(g)(3)(E)(iv).

Instead, at the final stage, the suitability analysis adds to the equation both the costs and benefits of other forest uses, such as outdoor recreation, watersheds, wildlife, fish, and wilderness. 36 C.F.R. § 219.14(c). A plan environmental impact statement must contain a cost-benefit analysis for each alternative management scenario, resulting in projections of the extent to which each plan option *as a whole* will protect environmental resources, produce timber, and satisfy public demands for other uses. *Id.* § 219.12(e)-(h). This third stage comparison is designed to identify "the alternative that comes nearest to maximizing net public benefits" – the charge of the multiple use determination. *Id.* § 219.12(f).

As a result of NFMA's three-tiered multiple use determination, land is deemed unavailable for logging where it is physically unsuitable, or where logging either would not be cost effective or would be incompatible with other management objectives, such as protecting water quality, wildlife habitat, or recreational opportunities. *Id.* § 219.14(a) & (c); *see also* 16 U.S.C. § 1604(g)(3)(E). No logging may be scheduled on physically or economically unsuited lands until the plan is changed. 16 U.S.C. § 1604(k); 36 C.F.R. §§ 219.14(d), 219.27(c)(1).

The forest plan translates this multiple use determination into a map, which zones the forest into management areas subject to distinctive management regimes. 36 C.F.R. § 219.11(c). The plan creates environmentally protective regimes, generally foreclosing or restricting exploitation of resources and habitat degradation, in areas recommended for wilderness or wild and scenic river designation, historic preservation sites, and research natural areas. *Id.* §§ 219.14(a)(4) & (c)(1), 219.18, 219.25.[2] Outside these protected areas, the plan establishes management area regimes to provide for various mixes of wildlife habitat, recreation, and commercial activities. Thus, in some areas, the plan imposes constraints on activities that will degrade essential wildlife habitat or impede its use by the desired species. *Id.* §§ 219.19, 219.27(g). Moreover, where undisturbed backcountry recreation is the plan objective for an area, the plan limits activities that alter the environment or interfere with wilderness recreation. In contrast, other areas

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[2] Forest plans make the final agency decision to recommend for or against designation of areas for protection under the Wilderness Act, 16 U.S.C. §§ 1133-1136, and the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287. Areas recommended for statutory protection are managed in accordance with that status until Congress acts on the recommendation. 16 U.S.C. § 1283(a); 36 C.F.R. § 219.14(c)(1).

may be designated for developed recreation sites, extensive road traffic, or off-road vehicle trail use. In addition, the plan determines the intensity and types of timber production and other commercial activities permitted in each management area.

Based on the multiple use determination, the plan also sets the allowable sale quantity ("ASQ") – a volume of timber production that may not be exceeded and that must be low enough to ensure a perpetual, sustained yield of timber. 16 U.S.C. § 1611(a). Finally, forest plans contain a timber sale schedule, drawn from both the ASQ and the multiple use determination, which often specifies the expected location, acreage, volume, roadbuilding requirements, and logging methods for the sales. *Id.* § 1604(f)(2); 36 C.F.R. § 219.16.

II. THE WAYNE NATIONAL FOREST PLAN

A. The Wayne National Forest

In the 1930's, the Forest Service and the State of Ohio identified an 800,000-acre area in southeastern Ohio where the federal government intended to purchase depleted mineral, forest, and agricultural lands and establish a national forest. *See* Land & Resource Management Plan ("LRMP") at 3-1. In 1951, under the authority of the Weeks Act, 16 U.S.C. § 515, the Secretary of Agriculture formally established the Wayne National Forest consisting of lands acquired in the purchase area. A. Lavelle, *Landscape Perceptions of the Wayne National Forest* at 1, 18-33 (1985) (in Vol. 1, Tab 49. Record for Sierra Club's Plan Administrative Appeal, hereinafter "Sierra Club Record").

The Wayne National Forest consists of fragments of federally owned land concentrated in three areas, totaling close to 180,000 acres. LRMP at 3-1. The federally owned lands are intermingled with private lands where little natural forest remains and road densities are high. *Id.* at 3-1, 3-2 &

3-7; Record of Decision ("ROD") at 7; Pet. App. at 45a. Throughout southeastern Ohio, cut-over pasture-like habitat is plentiful, and populations of game species, such as deer and ruffed grouse that depend on such habitat, have been thriving. *See* ROD at 16; Sierra Club Record, Vol. 1, Tab 49.

The Wayne National Forest is located in the sixth most populous state in the nation, within 100 miles of five population centers. LRMP at 1-2. Not surprisingly, given Ohio's population densities and the dearth of public forest land in the state, the forest is extremely important for outdoor recreation opportunities. *Id.* at 3-1.

B. The Wayne National Forest Plan

In the mid-1980's, the Forest Service began the NFMA planning process for the Wayne National Forest. At the outset, the Forest Service identified logging and a variety of recreational uses as the predominant demands for the forest. Many forest users, including plaintiffs' members, sought increased opportunities for hiking and other forms of wilderness recreation. ROD at 11.

In January 1987, the Forest Service sought public comment on its proposed plan and draft environmental impact statement ("DEIS"), which embodied its preliminary multiple use determination. Many proponents of wilderness recreation, including plaintiffs, called for significant increases in the amount of forest designated as management area 6.2, which prohibits motorized recreation, calls for road closures to foster backcountry recreation, and prohibits any interference with the natural forest. Final Environmental Impact Statement ("FEIS") at 2-7, 2-12, 2-25, 2-26, 2-32, 2-65; LRMP at 4-124 to 4-128. Management area 6.2 is the only zoning regime under which the probability of experiencing isolation, solitude, and closeness to nature is high. LRMP at 4-124, 4-127.

The final forest plan, adopted in January 1988, established 12 management areas, each designed to promote a different mix of forest uses. The management standards for these areas dictate whether, and the extent to which, logging, facilities construction, herbicide spraying, use of heavy machinery, grazing, utility corridors, horseback riding, and off-road vehicles, are allowed, and whether non-essential roads will be closed and hiking trails will be built to promote nonmotorized recreation. *See id.* at 3-3.

Although the final plan increased slightly to 10% of the forest the total acreage assigned to management area 6.2, the plan still would satisfy only half the public demand for backcountry recreation. ROD at 6, 29-30, 34.[3] At the same time, the final plan increased the amount of designated off-road vehicle trails over that proposed in the draft plan to 250 miles of trails over 36,000 acres. ROD at 3, 14. In addition, the plan allows logging throughout more than 70% of the forest, including in one of the two management areas that require significant road closures to promote nonmotorized recreation. LRMP at 3-3, 4-7. Even though these timber sales would generally lose money, the plan nonetheless calls for such logging as a way to generate additional foraging habitat for game species and thereby promote hunting. *Id.* at 3-5. As a result of the plan's motorized recreation and logging activities, the plan acknowledges that, outside management area 6.2, there is "a low probability of experiencing isolation from sights and sounds of people, independence, closeness to nature, and tranquility." LRMP at

[3] The plan protects additional discrete areas (which together comprise less than 10% of the forest) for potential historic sites, research natural areas, developed recreation sites, and three fishable/canoeable stream corridors. LRMP at 4-141 to 4-161, 4-177 to 4-179. However, these areas are not reserved for and, in some instances, are incompatible with undisturbed wilderness recreation.

4-86; *accord id.* at 4-75, 4-80, 4-83, 4-94, 4-100, 4-107, 4-111.

Both plaintiffs appealed the plan, and representatives of the timber industry, hunters, and oil and gas lessees intervened in the appeals. Pet. App. at 66a-67a, 78a-79a. In their administrative appeals, plaintiffs claimed that the plan arbitrarily overemphasized logging and the type of recreational opportunities in ample supply in the region at the expense of undisturbed forest and wilderness recreation, opportunities the forest is in a unique position to supply. Sierra Club Record, Vol. 3, Tab 131; Pet. App. at 72a-74a, 107a, 113a-114a, 120a-123a.

In November 1990 and January 1992, the Forest Service denied the appeals in what it characterized as final administrative decisions. Pet. App. at 76a-77a, 98a-99a. The appeal decisions acknowledged that the plan makes final decisions about how to balance and provide for multiple uses, but took the position that the plan made only tentative decisions regarding the preferred logging methods for individual timber sales. *Id.* at 75a, 87a, 93a.

III. PROCEEDINGS BELOW

In March 1992, plaintiffs filed this lawsuit, asserting numerous violations of NFMA and NEPA in the plan's allocation of too little forest to wilderness recreation and too much to game habitat, motorized recreation, logging, and other activities that interfere with wilderness recreation. *Id.* at 133a-145a; JA 16-21. The second amended complaint alleges that plaintiffs' members regularly visit the Wayne National Forest for recreational purposes, including hiking, birdwatching, and camping, and for professional and scientific pursuits. JA 13.[4]

[4] The complaint alleged specific legal defects in the plan environmental (Cont'd)

In March 1994, the United States District Court for the Southern District of Ohio granted summary judgment to the federal defendants. Pet. App. at 10a-48a. Neither the government, nor Ohio Forestry Association, which intervened as a defendant, raised justiciability concerns in the district court.

On January 21, 1997, the Court of Appeals for the Sixth Circuit reversed and remanded. Responding to arguments raised by the government for the first time on appeal, the court held that plaintiffs have standing to challenge the plan:

> Land and Resource Management Plans represent significant and concrete decisions that play a critical role in Forest Service actions. "To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge." If the Sierra Club was allowed to challenge the Forest Service plan only at the site-specific stage, then the meaningful citizen participation contemplated by the National Forest Management Act "would forever escape review."

Id. at 4a (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992)). The court of appeals also held that the challenge was ripe for review: "Plaintiffs need not wait to challenge a specific project when their grievance is with an overall plan." Pet. App. at 4a.

On the merits, the court reversed because the Forest Service "made arbitrary assumptions in the Wayne planning process that biased the plan toward timbering." *Id.* at 3a. By

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(Cont'd)
impact statement, its suitability determination, its objectives that call for extensive even-aged management, including clearcutting, and the plan's failure to make certain decisions. JA 17-25.

emphasizing the value of creating game habitat through logging, the forest plan is based on the assumption that logging "will provide new opportunities for recreation" and "enhance the diversity of plant and animal communities." *Id.* at 6a. This assumption ignored evidence that "the Wayne is surrounded by and intermingled with privately-held land which already contains an abundance of" game habitat, and much of the Wayne itself has been logged or developed. *Id.* In contrast, the court observed: "Timbering does not promote the kind of recreational activities that are in demand in the Wayne; in fact, recreation like fishing and hiking is harmed by clearcutting." *Id.* Judge Batchelder concurred in the decision, except for *dictum* regarding the Forest Service's built-in incentives to favor logging over other forest uses. *Id.* at 9a.

During the pendency of the petition for a writ of certiorari, several developments occurred. First, on remand from the court of appeals, plaintiffs filed a motion for summary judgment supported by affidavits from three of their members. One affiant is a repeat visitor to most of the forest's recreational facilities, key landmarks, and hiking trails, and the author of a natural history guide featuring the Wayne National Forest. Affidavit of Stephen J. Ostrander (Aug. 25, 1997). Another affiant leads hikes for the Sierra Club throughout the Wayne National Forest, including in areas that are not preserved for wilderness recreation in the plan. Affidavit of David Scott (Aug. 25, 1997). The third affiant regularly hikes, camps, observes birds and wildlife species, and studies the forest types in the Wayne National Forest. His affidavit identifies 17 specific areas that he frequents outside management area 6.2, many of which were opened to off-road vehicles by the plan. Affidavit of Jason Tockman (Aug. 25, 1997). Moreover, two of the affiants regularly hike at the sites of two timber sales awarded and partially logged during the pendency of the litigation.

Ostrander Aff. ¶ 7; Tockman Aff. ¶ 8. Based on the Sixth Circuit decision, the district court issued a preliminary injunction prohibiting further logging of these two timber sales. Order, No. C2-92-249 (S.D. Ohio, Sept. 5, 1997).

Second, the Wayne Forest Supervisor announced that the forest plan will be amended "to bring its vegetation management projections into conformity with what has happened on the ground since the 1988 Forest Plan approval and with what is expected to happen in the future." Letter from José A. Zambrana (Aug. 29, 1997). More specifically, the announcement indicates that a 1992 Forest Service directive from the Chief of the Forest Service to limit clearcutting, coupled with an unbroken series of appropriations riders restricting clearcutting on the Wayne National Forest to 25% of 1989 levels, has resulted in a significant decrease in clearcutting on the forest. *Id.* The Forest Supervisor did not, however, suspend logging or other activities implementing the plan.[5]

SUMMARY OF ARGUMENT

Challenges to NFMA-mandated decisions definitively made in a forest plan are ripe for review where resolution of the challenge is not dependent upon subsequent project implementation. The Wayne forest plan definitively made the NFMA-mandated multiple use/suitability determination for the Wayne National Forest and, based on that determination, established a zoning regime that prescribes how much of the forest is set aside for wilderness recreation and how much is subject to motorized recreation and logging.

[5] The affidavits, district court order, Forest Supervisor's letter, and Chief of the Forest Service's clearcutting directive have been lodged with the Clerk by petitioner and the government.

Subsequent project decisions will not revisit or elucidate the plan's multiple use/suitability determination. Instead, once the agency resolves any administrative appeals of the plan, which the NFMA regulations characterize as the final agency action appropriate for judicial review, the plan's multiple use determination and zoning regime are final, fixed, and binding until the plan is revised or amended. In implementing the plan, the Forest Service will simply design projects to fit within the plan's zoning regime, without revisiting the wisdom or propriety of the plan's multiple use balance. The agency will not pursue activities to promote wilderness recreation by, for example, closing roads, where that is not an objective of the plan. Therefore, such plan priorities and directives cannot be addressed by challenging projects. Moreover, each individual project, viewed in isolation, fails to present fully the mandatory suitability analysis underlying the plan's multiple use determination. Relegating review of the plan's multiple use determination to individual project challenges would miss the forest for the trees. Because review postponed will be review denied, plaintiffs' challenge to the Wayne forest plan's multiple use determination is ripe.

Plaintiffs also have standing to challenge the Wayne forest plan's multiple use determination. As regular users of the Wayne National Forest for hiking, birdwatching, camping, and wildlife study, plaintiffs' members are adversely affected by the plan's decision to protect only 10% of the forest for undisturbed backcountry use. In other parts of the forest, the plan mandates no affirmative steps, like closing all non-essential roads, to promote wilderness recreation. Instead, in those areas, the Forest Service will actively pursue and permit a full range of activities that interfere with wilderness recreation, such as motorcycle trail use, roadbuilding, development of utility corridors,

and logging. The combined effect of these activities impairs plaintiffs' ability to enjoy undisturbed wilderness recreation, quite apart from the logging permitted by individual timber sales. Moreover, by the time the plan administrative appeals were decided so that plaintiffs could file this case, the Forest Service had proceeded with numerous activities, including more than 40 timber sales, in areas not allocated to wilderness recreation. Not only was the injury from the plan imminent; it had already begun to occur.

On the merits, the plan arbitrarily allocated too little forest to wilderness recreation and too much to even-aged logging, and clearcutting in particular. The Forest Service erred because it erroneously concluded that creation of habitat for game species rendered such logging beneficial to recreation and wildlife diversity. The Forest Service's depiction of clearcutting as unequivocally beneficial disregarded logging's adverse impacts on wilderness recreation and extensive evidence of unfulfilled demand for this kind of recreation in and around the Wayne National Forest.

ARGUMENT

I. THIS FOREST PLAN CHALLENGE IS JUSTICIABLE.

The justiciability question – whether plaintiffs may bring this challenge upon final adoption of the forest plan - is one of timing, implicating both standing and ripeness considerations. *See Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975) ("The standing question thus bears close affinity to questions of ripeness - whether the harm asserted has matured sufficiently to warrant judicial intervention"). Under both doctrines, plaintiffs' challenge to the Wayne forest plan is justiciable.

A. This Forest Plan Challenge Is Ripe For Judicial Review.

Plaintiffs agree with the government that this case should be decided under the ripeness doctrine. The issue is one of timing, and Article III presents no obstacles to judicial resolution of this case.

The ripeness doctrine calls for a twofold inquiry assessing: "the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In conducting this inquiry, the aspect of the forest plan at issue must be the focal point. Forest plans contain broad explanatory discussions of forest conditions and previews of possible projects, which are not ripe for review. In contrast, definitive forest plan decisions, like the NFMA-mandated multiple use determination, are ripe for review because the plan is the final word, judicial review is in no way dependent on plan implementation, and hardship would result from postponing review.

1. Plaintiffs' Challenge To The Wayne National Forest Plan's Multiple Use Determination Is Fit For Judicial Review.

Whether a particular plan decision is fit for review depends on whether the plan makes a final and definitive determination and whether judicial review will benefit from future applications of that plan decision. *Abbott Laboratories*, 387 U.S. at 149, 151-52; *see, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Development Comm'n*, 461 U.S. 190 (1983) (purely legal claim ripe; challenge that depended on case-by-case application of statute not ripe); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) (facial challenge to election procedures justiciable where application would not

assist judicial inquiry, but not where employers or state bodies had discretion to prevent harm to union); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 82 (1978) (future developments would not advance significantly the court's ability to decide the legal issues).

Like the regulation at issue in *Abbott Laboratories*, 387 U.S. at 151-52, the forest plan is a final agency action, not a tentative determination by a subordinate. The Regional Forester issued a *final* record of decision adopting the plan, along with a *final* environmental impact statement on the plan, and the Chief of the Forest Service issued *final* agency decisions denying plaintiffs' administrative appeals and affirming the plan.[6] Moreover, the plan will remain in place and bind the agency in its management of the forest until superseded by a plan revision, a plan amendment, or an Act of Congress.

Both the government and Ohio Forestry Association concede that some decisions definitively made in a plan are ripe immediately upon the plan's adoption. Gov't Br. at 4 n.2, 22-23 n.16, 12-13 n.9, 27; Pet. Br. at 17. This case challenges such a decision because the Wayne forest plan definitively made the NFMA-mandated multiple use determination and converted that determination into a fixed zoning system and binding rules for the Wayne National Forest. In this respect, the forest plan has "direct and appreciable legal consequences," *Bennett v. Spear*, 117 S. Ct. 1154, 1169 (1997), and it is far more focused and determinative than the broad land withdrawal review program

[6] The government repeatedly asserts that administrative appeals of timber sales lead to final agency decisions ripe for judicial review. Br. at 4 n.3, 35-36. However, the Forest Service's appeals process for forest plans also produces final agency decisions characterized by the NFMA regulations as appropriate for judicial review. 36 C.F.R. §§ 217.17(g); 217.18.

at issue in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 890 (1990).

For example, a forest plan decides which areas will be recommended for formal wilderness designation and protected under the plan until Congress acts on these recommendations. 36 C.F.R. § 219.14. This decision is final and results in environmentally protective treatment of certain areas, but not others. Certain types of future development in an unprotected area may be a consequence of that determination, but awaiting such developments would not advance a court's ability to evaluate the plan's overall wilderness determination. Nor would such a discrete development be illustrative of the immediate harm caused by the plan's failure to afford greater affirmative wilderness protection throughout the forest. *See infra* at 22-23.

Here, the challenged multiple use determination and zoning scheme is the consummation of the agency's suitability analysis. Judicial review of this determination will be predicated on the plan's administrative record and will not be affected by future administrative proceedings on individual projects. *See Abbott Laboratories*, 387 U.S. at 149 (factors making issues fit for review).

Presumably, Ohio Forestry Association would argue that it could challenge a hypothetical Wayne forest plan that allotted 90% of the forest to wilderness recreation, thereby placing most of the forest off-limits to logging. *See* Pet. Br. at 17; *see also* Gov't Br. at 12-13 n.9. Indeed, the timber industry has often mounted judicial challenges to forest plans that allowed less logging than sought by the industry. *See, e.g., Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd*, 80 F.3d 1401 (9th Cir. 1996) (rejecting industry challenge); *Mountain States Legal Found. v. Glickman*, 922 F. Supp. 628 (D.D.C. 1995), *aff'd*, 92 F.3d 1228 (D.C. Cir. 1996) (same). If such an industry claim is ripe because it challenges the immediate closure of so much

of the forest to logging, it makes no sense to require plaintiffs' counter-challenge to the plan's protection of too little of the forest for wilderness recreation to wait for a specific timber sale. Both challenges present issues that are fit for review.

While the Forest Service will subsequently decide which particular timber sales to pursue in management areas where logging is a principal objective, the plan's management area designations and objectives remain fixed for the life of the plan. The court "will be in no better position later than we are now to confront" the legal challenge to the plan's multiple use determination and its consequent land allocations. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 144-45 (1974). As in the *Rail Reorganization Act Cases*, the injurious events – activities that impede undisturbed wilderness recreation - are certain to occur and immediate behavior is affected.

As with facial challenges to zoning ordinances, a challenge to the validity of a forest plan's entire multiple use determination is fit for review when the plan is adopted. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). In contrast, a timber sale is analogous to application of a zoning ordinance to particular property, which often, but not always, becomes ripe only upon final application of the ordinance to the property. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (challenge to zoning ordinance without final application to plaintiff not ripe, except for question of whether enactment of ordinance itself violated Constitution); *but see Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997) (takings claim ripe before attempts to sell tradable development rights); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (takings challenge ripe before final decision on development permitted on petitioner's property). Where, as here, the challenge is directed at the validity of the zoning regime as a whole, rather

than at any particular application of it, the facial challenge is fit for review. *See EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12 (1980) (facial challenge to validity of regulation limiting availability of variances ripe).

2. Postponing Review Would Cause Extreme Hardship.

Facial challenges that are fit for review are ripe if delaying judicial resolution would cause hardship. As the Court stated in the *Regional Rail Reorganization Act Cases*, 419 U.S. at 143: "Where inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." Indeed, in *Northeastern Florida Chapter, Associated General Contractors v. City of Jacksonville*, 508 U.S. 656 (1993), companies with a history of regularly bidding on government contracts did not need to bid on particular contracts to challenge a minority set aside. *See also Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 265 n.13 (1991) (challenge need not await application of challenged congressional veto to challengers' detriment).

Postponing judicial review would cause hardship to plaintiffs, the Forest Service, and other users of the forest. The hardship resulting from delay takes three forms: (1) delay would deny plaintiffs meaningful review of the plan's multiple use determination and zoning regime; (2) it would defeat NFMA's purpose of establishing the multiple use balance for each forest upfront in a forest plan based on a valid analysis of the demand for and trade-offs between competing forest uses; and (3) it would lead to duplicative challenges to individual projects and wasteful and potentially pointless devotion of resources to plan implementation.

a. Postponing Judicial Review Would Allow Critical Plan Decisions To Escape Review.

Most importantly, postponing review would, in effect, deny review of plaintiffs' challenge to the plan's multiple use determination. This Court has been reluctant to embrace rigid justiciability rules that would allow agency actions to evade review. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). A rule forbidding facial challenges to final forest plan decisions would lead to such an untenable result.

The government seeks to assure the Court that plan determinations may be reviewed if they underlie, "become relevant to," or "bear[] on the propriety of" a particular timber sale. Br. at 32, 39. However, the core decisions made in the plan that dictate the prioritization and zoning of forest activities will rarely manifest themselves in particular timber sales or other individual projects in identifiable and particularized ways.

For example, once a forest plan decides which areas to recommend for formal wilderness designation, the Forest Service does not reconsider that decision in connection with individual projects:

> [P]ossible wilderness recommendations are evaluated during the forest planning process. ... It is during this programmatic step in the Forest Service's decisionmaking process that the agency determines which lands to recommend to Congress for inclusion in the National Wilderness Preservation system.

Idaho Conserv. League v. Mumma, 956 F.2d 1508, 1516 n.17 (9th Cir. 1992) (quoting Forest Service documents). As a result, wilderness decisions made at the forest plan level are

excluded from project-level decisionmaking. *Id.*[7]

Under the Wayne forest plan, management area 6.2 is the only management area set aside for undisturbed backcountry recreation. The goal for areas assigned to management area 6.2 is to provide 2500-acre blocks of natural forest where individuals can experience "considerable solitude" and "closeness to nature." LRMP at 4-124. To accomplish this goal, the plan mandates closing non-essential roads. Such extensive road closures will not be actively pursued in other areas of the forest. Accordingly, no project decisions will provide plaintiffs a vehicle for challenging the failure to embark on such programs throughout a wider area of the forest.

Similarly, in management area 6.2, the plan prohibits logging, herbicides, facilities construction, off-road vehicles, grazing, and mechanized equipment, and it severely limits utility corridors and road construction. *Id.* at 4-124 to 4-128. Conversely, few of these constraints apply in the remainder of the forest. The Forest Service will not revisit the plan's multiple use determination in making individual project decisions in these areas, but instead will simply design projects to fit within the plan's parameters and meet its objectives.

In an overall sense, the multiple use determination bears on the propriety of every timber sale and every other activity taking place under the plan. However, the government insists on a more particularized nexus between individual projects and specific plan decisions before a plan's

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[7] Consideration of a no action alternative to logging a particular timber sale does not revisit the plan's land allocations or its overall timber sale program. Even if the particular timber sale is dropped, the immediate effects of the management prescriptions for the land allocation will continue to be felt, and other timber sales will follow in order to meet the forest plan's objectives.

multiple use determination is ripe. Identifying such a nexus promises to embroil the courts in cumbersome side-litigation over whether and precisely how plan decisions affect subsequent project decisions.

Ultimately, this search for a direct and particularized nexus may prove pointless. A forest plan's multiple use determination is the engine that drives forest management, but it will rarely surface to the extent demanded by the government in a particular timber sale decision. For example, any cost-benefit analysis conducted at the project stage will focus on the bottom line for a particular timber sale, not on the economic suitability analysis and multiple use balance struck for the forest as a whole.

Similarly, one consequence of the multiple use determination is establishment of an allowable sale quantity ("ASQ") that serves as a ceiling for timber production. The ASQ may be based on an inadequate rationale for permitting money-losing timber sales, it may violate NFMA's sustained yield mandate, or it may be so high that it jeopardizes viability of wildlife species. *See, e.g., Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881 (8th Cir. 1995) (Forest Service reduced ASQ significantly while revisiting whether to authorize below-cost timber sales); *Resources Ltd. v. Robertson*, 35 F.3d 1300 (9th Cir. 1994) (Forest Service arbitrarily set ASQ at level its experts believed would harm grizzly bear populations). It is not at all clear how a litigant could prove that the ASQ has become "relevant" to a particular timber sale, unless it is assumed to be relevant to all timber sales, in which case waiting for a particular sale serves no purpose. A search for a more particularized link may delay review of an arbitrary ASQ until it has been reached, even though the ASQ is a driving force behind the forest's entire timber program. *See Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218 (10th Cir. 1997) (court refused to decide challenge to ASQ as violating

NFMA's sustained yield requirement because timber sale would not push timber production over the ASQ).

Piecemeal judicial review would also be unworkable for certain species' viability determinations. NFMA charges the Forest Service with protecting species viability in forest plans because that is the scale at which species' survival can be assessed and assured. 16 U.S.C. § 1604(g)(3)(B); 36 C.F.R. § 219.19. Waiting for particular timber sales would not enhance an informed assessment of the species' overall needs and the extent to which they are met throughout the forest as a whole under the plan's land allocations. *See Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd*, 80 F.3d 1401 (9th Cir. 1996) (challenge to adequacy of forest plan to protect sufficient habitat to ensure viability of certain species); *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in pertinent part sub nom., Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (same).

Waiting could also be futile. For example, a forest plan might set road density targets at a level that is too high because the targeted road densities cause grizzly bear fatalities. Yet the plan's targets would limit the number of road closures required on the forest. Since the harm to grizzly bears stems from the forest's failure to close more roads, few, if any, projects would present an opportunity to challenge the flawed aspects of the plan.

Here, the plan's flawed multiple use determination drives all forest activities by dictating where particular forest activities must be (or alternatively, will not be) safeguarded and promoted. Unless the plan's multiple use determination and zoning regime are addressed in a challenge to the plan, they may entirely escape review.

b. Postponing Judicial Review Clashes With The Purpose And Design Of NFMA's Planning Process.

Postponing review of various plan elements until they manifest themselves concretely in a particular timber sale would undermine NFMA's direction to establish each forest's multiple use allocations through a prescribed interdisciplinary and public planning process *before* plan implementation commences. *See Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978) (delay would undermine Act's purpose to eliminate uncertainty about private liability).

NFMA directs the Forest Service to make the core multiple use allocations for each forest upfront in forest plans. Where, as here, the multiple use determination is predicated on an erroneous undervaluation of wilderness recreation, the flaws in the suitability/multiple use determination infect the entire management regime put into place by the plan. Indeed, the Forest Service acknowledged numerous trade-offs between competing uses. For example, by providing for wilderness recreation and preservation of old-growth forest the plan precludes timber production and creation of habitat for game species. ROD at 16, 31, 32.

Changing one facet of the plan's multiple use determination has a ripple effect on other parts of the plan. For example, a revised suitability determination might require changes to the management area boundaries, the allowable sale quantity, or the road construction and other activities prescribed for each area. *See Sierra Club v. Cargill*, 11 F.3d 1545 (10th Cir. 1993) (changing plan restocking period from seven years to NFMA's mandated five-year period enlarged estimate of physically suitable land, necessitating a new suitability analysis and reassessment of land allocations). Piecemeal review of the plan's multiple use determination through individual project challenges would defeat NMFA's

mandate to have each forest governed from the outset by a comprehensive plan predicated on a valid multiple use determination.[8]

NFMA also mandates a thorough analysis of public demands and the forest's ecological needs through a public, interdisciplinary process that integrates both NEPA's environmental impact statement requirement and the NFMA-mandated suitability analysis. This case challenged the plan's environmental impact statement for failing to include an adequate range of alternative zoning regimes to reflect the recreational uses and forest conditions sought by plaintiffs. Delaying review of the plan's environmental impact statement would defeat the purpose of both NEPA and NFMA to provide a thorough environmental analysis of plan alternatives sufficiently in advance to inform the plan's multiple use determination.[9]

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[8] Postponing review would also frustrate NFMA's requirement that each plan develop and adopt a forest-wide monitoring program in order to generate sufficient information to ensure that forest activities will protect the forest's environmental resources. 16 U.S.C. § 1604(g)(3)(C); 36 C.F.R. §§ 219.11(d), 219.12(k), 219.19(a)(1). If a litigant must wait and challenge a timber sale in order to obtain review of an inadequate monitoring program, the defects in the program could go uncorrected for years, leaving the forest without the data needed to assess and design projects to avoid environmental harm.

[9] A subsequent environmental impact statement for a timber sale (if one is even prepared) will consider various designs for that sale, not whether more wilderness recreation should be provided throughout the forest as a whole. For many, perhaps most, projects, no environmental impact statement will be prepared. Instead in the Wayne National Forest, the Forest Service prepares a more cursory, "rough-cut" environmental analysis or no further environmental review for projects falling within categorical exemptions from NEPA's environmental impact statement requirement. *See* 40 C.F.R. § 1501.4(a), (b), (e); *see, e.g.*, 57 Fed. Reg. 43,180, 43,209 (1992) (timber sale of 250,000 board feet or less categorically exempt).

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992), in addressing issues of timing for justiciability purposes, this Court indicated that no justiciability principles would preclude litigants from seeking "to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*, the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them)." *See also id.* at 572 n.7 (elaborating on relaxed justiciability inquiry for litigating procedural claims before on-the-ground harm occurs).

Similarly, here, defects in the NEPA analysis of plan alternatives are properly subject to judicial review upon adoption of the plan so that the agency can prepare a proper environmental impact statement and, if necessary, revise the plan's multiple use determination and zoning regime in a timely fashion. Postponing judicial review would delay a valid alternatives analysis until well into the life of the plan when it could no longer serve its designated purpose.

The regulatory process for appealing forest plans further underscores the importance of resolving plan challenges upon adoption of the plan. Under the NFMA regulations, appeals of forest plans must be filed within 90 days of the plan's approval (or amendment or revision). 36 C.F.R. § 217.8(a). Waiting to obtain judicial review of the issues resolved in such appeals would allow uncertainties about the plan's validity to persist well into the life of the plan. A failure to resolve the propriety of a plan's multiple use determination upfront will defeat NFMA's purpose of basing management of each forest on the forest plan's multiple use balance that maximizes net public benefits.

c. Postponing Judicial Review Would Waste Agency, Judicial, And Public Resources.

Postponing review of the plan's multiple use determination also would be extremely wasteful and inefficient for forest users and the government alike. It takes years and an average of $2.5 million dollars to develop a forest plan. Teeguarden, *Benefit-Cost Analysis in National Forest System Planning: Policy, Uses and Limitations*, 17 Envtl. L. 393, 394 (1987).

Moreover, both the Forest Service and forest users take actions in reliance on forest plans. Typically, each year, the Forest Service develops multiple timber sales across the forest to achieve the plan's objectives. If the forest plan's zoning is defective, the Forest Service may be devoting tens of thousands of dollars to developing these sales in an exercise of futility. In fact, after adoption of the plan, but before this case was filed, the Forest Service proceeded with more than 40 timber sales. *See* Forest Service, Information on Timber Sales Sold on the Wayne National Forest 1988-1997 (lodged with the Clerk). For their part, timber companies, oil and gas companies, recreational outfitters and others may look to the forest plan in making business decisions. *See EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12 (1980) (facial challenge ripe because companies make business decisions based on regulation); *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190 (1983) (challenge to nuclear power plant moratorium ripe because companies spend large sums of money far in advance of nuclear power plant certification).

The government's preferred approach of relegating all forest plan challenges, like this one, to cases challenging specific timber sales would necessitate countless challenges

to individual projects that may not have overriding independent significance, but which implement the plan's management regime. To obtain review of the Wayne plan's insufficient allocation of land to wilderness recreation, for example, plaintiffs would have needed to challenge more than 40 timber sales and dozens of other activities, such as roadbuilding, utility pole permits, and facilities construction, in areas not designated as management area 6.2. *See, e.g.*, Annual Monitoring and Evaluation Report, LRMP Wayne National Forest, FY 1989, at 2-3 (lodged with the Clerk). Even though plaintiffs' grievance is not with each of these activities in isolation, the government's approach would convert the local district court into a national forest czar overseeing the propriety of each individual action permitted by the plan's flawed management area designations. *See Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967) (later piecemeal resolution of controversy would be costly and inefficient).

B. Sierra Club Has Standing To Challenge The Wayne Forest Plan's Multiple Use Determination.

1. Sierra Club Is A Proper Party To Bring This Challenge.

It is well-settled that standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). There can be no doubt that Sierra Club is a proper party to challenge inadequate wilderness recreational opportunities in the Wayne National Forest because its members regularly engage in such activities. Indeed, in the court of appeals, the government conceded that Sierra Club members actively use and will return to the

Wayne National Forest. Br. at 26-27 n.20.[10]

The government now seeks to impose greater burdens on plaintiffs to demonstrate a particularized linkage to an area that is about to be logged under the plan and to challenge plan decisions only in the context of individual timber sales. Br. at 15, 23 n.17, 41-43 & n.33.[11] This new assertion takes an unduly narrow view of plaintiffs' injuries as limited to the direct effects of logging individual timber sales and of the plan as no more than a series of timber sales strung together. In contrast, plaintiffs' injury is caused by the plan's failure to provide sufficient wilderness recreation opportunities and the consequent intrusive activities occurring throughout the unprotected areas.

Plaintiffs' interests extend beyond the area of each individual timber sale and are harmed by a variety of non-logging activities approved by the plan's land allocations, such as motorized recreation, herbicide use, grazing, utility pole corridors, roadbuilding, and maintenance regimes, as well as by the plan's failure to direct more road closures to promote undisturbed backcountry recreation. Those injuries were certainly impending upon adoption of the plan, and they will not go away simply because a few timber sales do not proceed as initially anticipated.

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[10] *Reno v. Catholic Social Services*, 509 U.S. 43 (1993), is inapposite because, there, it was difficult to predict whether the plaintiffs would be adversely affected by the challenged rule. Here, plaintiffs are clearly affected by the amount and quality of wilderness recreation opportunities in the Wayne National Forest.

[11] While the government is now seeking to channel all plan challenges into litigation over timber sales, it has previously objected to raising plan challenges in the context of a timber sale. *See Friends of the Bow v. Thompson*, 124 F.3d 1210, 1217 (10th Cir. 1997)(challenge to ASQ); *Inland Empire Public Lands Council v. U.S. Forest Service*, 88 F.3d 754, 762 n.11 (9th Cir. 1996) (viability claim); *Smith v. U.S. Forest Service*, 33 F.3d 1072 (9th Cir. 1994) (wilderness recommendation issues).

Plaintiffs' affidavits demonstrate that their members use diverse areas of the forest for hiking, camping, bird watching, scientific research, and professional endeavors. One affiant has identified 17 specific areas that he frequents, which are not protected for natural backcountry recreation under the plan. Indeed, he hikes in areas affected by the two timber sales enjoined by the district court.[12] Plaintiffs' members have identified specific and numerous hiking areas that they use and that the plan does not preserve for undisturbed backcountry use. *Cf. Lujan v. National Wildlife Fed.*, 497 U.S. 871, 886-89 (1990) (link to "an immense tract of territory" insufficient for standing).

Article III does not call for an exercise in precision akin to fitting the last piece into a jigsaw puzzle. Where a party's harm derives from a programmatic decision, the party need not prove a separate harm from a particular application of that decision (or as the government asserts, take all steps necessary to mount an independent challenge to that application). *See Northeastern Florida Chapter, Associated General Contractors v. City of Jacksonville*, 508 U.S. 656 (1993); *see also* Gov't Br. at 20-21 & n.14 (acknowledging that Article III erects no barrier to facial challenges to regulations or programmatic decisions). For all these reasons,

[12] Plaintiffs or their members administratively appealed one of these sales, as well as at least three others proceeding under the plan. The government's brief (at 36 n.26) refers to two *successful* timber sale appeals, but fails to disclose the other administrative appeals pursued without success in large part because the plan pre-ordained logging in the particular management area. Plaintiffs have lodged copies of the appeal decisions with the Clerk. *See also* Ostrander Aff. ¶ 7 ("The Forest Service rejected opposition to the specific projects in part because the project areas were allocated to timbering in the pending plan"); Tockman Aff. ¶ 6 (same).

plaintiffs are proper parties to mount this challenge.[13]

2. *Plaintiffs' Injuries Were Sufficiently Imminent Upon Adoption Of The Plan To Satisfy The Temporal Component Of Standing.*

The timing issue in this case implicates all three prongs of standing: Is the injury from the plan imminent? Is it the plan, as opposed to an unpredictable intervening action, that causes plaintiffs' harm? Will an order directing a plan revision be likely to redress the injury? *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In this case, the three inquiries merge and confirm plaintiffs' standing because the forest plan's multiple use determination establishes a zoning regime, binding rules, and objectives that dictate harmful on-the-ground activities.[14]

The imminence aspect of standing is satisfied when a plaintiff has sustained an actual injury or is threatened with a real and immediate injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). It has long been settled that "[o]ne does not have to await the consummation of threatened injury

[13] The government tries to justify its rigid justiciability position based on its fear that a court might issue an injunction that is broader than the injuries or claims asserted. Br. at 15, 38-39 & nn. 28-29. It raises the specter of a court enjoining all operations under a forest plan in a case contesting only one aspect of the plan. Of course, a court must balance the equities in determining the scope of an injunction. The government's concerns should be raised in that context, rather than in an attempt to close the door to plan challenges before the issue of remedy even arises.

[14] Prudential standing requirements are satisfied here. The forest plan is a final agency action, *see supra* at 18-20, and Sierra Club's members, as forest users, are among those Congress relied upon to participate in forest planning and challenge agency disregard of the law. *Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997); *see supra* at 26-28.

to obtain preventive relief. If the injury is certainly impending, that is enough." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

Plaintiffs' injuries from the Wayne forest plan are certainly impending because they flow directly from the plan's management regime. The plan set aside only one management area, comprising 10% of the forest, for wilderness and undisturbed natural recreation. Indeed, the Forest Service acknowledged that the plan would meet barely half the public demand for backcountry recreation. ROD at 29. In management area 6.2, *no* habitat-degrading activities are permitted, and non-essential roads will be closed to promote undisturbed wilderness recreation. Outside management area 6.2, plaintiffs' members will encounter off-road-vehicles, utility corridors, and in many areas, excessive road densities, all of which make remote natural experiences unlikely. Indeed, many intrusive activities, such as opening trails to motorcycles or using heavy machinery, will go forward without any additional consideration of their impact on wilderness recreation. Conversely, affirmative measures to promote undisturbed backcountry recreation, such as closing roads and building additional hiking trails, will take place only in areas targeted for such activities in the plan.

Both the government and petitioners concede that a plan's closure of an area to particular users causes imminent harm to those users. Gov't Br. at 12-13 n.9; Pet. Br. at 17. The flipside is also true. A plan's *failure* to close a trail to motorcycles, for example, causes harm to backcountry hikers whose solitude will be disturbed by revving motors. Because the management regimes challenged here became effective upon adoption of the plan, their harm was similarly immediate. *See Friends of the Boundary Waters Wilderness v. Robertson*, 978 F.2d 1484 (8th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993) (forest plan illegally allowed motorized portages), *further proceedings*, 53 F.3d 881 (8th Cir. 1995).

3. Causation And Redressability Are Satisfied Because The Plan Alters the Legal Regime and The Forest Service Has The Authority To Implement Its Own Plan Regardless of Intervening Third Party Actions.

Not only does the plan immediately impose a particular management regime, but its zoning and objectives drive and substantially influence all forest activities. Indeed, the Forest Service admits, as it must, that the plan has a "significant effect on the nature and extent of subsequent timber harvest activities." Gov't Br. at 15, 31. The Forest Service never disavows the plan. Since the Wayne forest plan established an overriding objective for several management areas that can only be achieved by even-aged logging – *e.g.*, the conversion of mature forest into pasture for game species – logging precipitated by the plan is imminent. ROD at 20 (logging is necessary to accomplish plan's objectives and attain plan's desired future conditions). In fact, from 1988-1991, before the superseding directives, the Forest Service implemented the Wayne forest plan generally in accordance with the projections made in the plan. *Compare* LRMP Table A-1 (plan's timber sale schedule) *with* Forest Service, Information on Timber Sales Sold on the Wayne National Forest, 1988-1997 (the number of timber sales that actually occurred in management areas 2.1, 3.1, 3.2, 3.3, and 6.1 equaled or exceeded the number projected in the plan for these areas).

What the Forest Service emphasizes is that no particular timber sale is certainly impending, not that the occurrence of logging as promised in the plan is unlikely or speculative. While the plan may not be the last decisionmaking step before particular trees will be cut, this Court has never required that the challenged action be the last

link in the chain of causation.

In *Bennett v. Spear*, 117 S. Ct. 1154 (1997), this Court held that irrigation districts and ranchers had standing to challenge a Fish and Wildlife Service biological opinion issued under the Endangered Species Act, 16 U.S.C. § 1536(a)(2), even though the Bureau of Reclamation retained authority to determine whether to reduce water deliveries in accordance with the opinion. The Court rejected the notion that the challenged action must be "the very last step in the chain of causation" where it "alters the legal regime" and produces a "determinative or coercive effect upon the action of someone else." *Id.* at 1164. The biological opinion's incidental take statement had such a coercive effect because of its legal effect under the Endangered Species Act and because federal agencies rarely act in disregard of such opinions. *Id.* at 1164-65.

Here, the forest plan is the Forest Service's blueprint for running the Wayne National Forest. Because the plan establishes the binding rules with which all forest activities must comply, it has "a determinative effect" on forest projects. *See* 16 U.S.C. § 1604(i). If the forest plan prohibited logging, other habitat-degrading activities, and off-road vehicles throughout most of the forest, the plan would itself guarantee additional opportunities for wilderness recreation. For plaintiffs to obtain that same protection through serial challenges to timber sales proceeding in areas suitable for backcountry recreation would require more than a stroke of luck. Indeed, for the Wayne National Forest, it would require defiance of the plan's multiple use determination and abandonment of the plan's objectives for six management areas because the objectives for these areas cannot be achieved without logging. LRMP at 4-74, 4-83, 4-86, 4-97, 4-99, 4-114.

Moreover, the acts necessary to implement the plan according to its terms, and thereby harm plaintiffs, are

entirely within the Forest Service's control. Where third parties are involved, a litigant must show only that the intervening choices of third parties on which plaintiff's injury depends "have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan v. Defenders of Wildlife*, 504 U.S. at 562.

Here, the plan embodies the Forest Service's choices about how it will manage the forest. Because the Forest Service has the ability to implement its announced blueprint, plaintiffs' injuries are in no way dependent on speculative inferences about the independent actions of third parties not before the Court. It is far from speculative to assume that the Forest Service will adhere to its overall plan. It would be far more speculative to suggest that the Forest Service will deviate significantly from its announced plan.[15] The chain of causation is more direct and redressability more predictable than in other situations found wanting by this Court. *See, id.* at 568-71 (actions of other agencies and countries receiving U.S. funds for development projects); *Allen v. Wright*, 468 U.S. 742 (1984) (parents' response to private schools' loss of tax exemption).[16]

The government takes great pains to point out that Congress has the power to create a cause of action authorizing

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[15] Indeed, Ohio Forestry Association urges the Court to decide the merits because timber sales have proceeded and will continue to proceed in accordance with the plan. Pet. Br. at 25-26. This concession reveals that Article III concerns are not the root of petitioner's argument, but instead petitioner simply prefers individual timber sale cases to forest plan challenges (except, apparently, in this instance).

[16] This case is a far cry from those in which the chain of causation was attenuated or implausible. *See, e.g., Whitmore v. Arkansas*, 495 U.S. 149 (1990) (death row inmate obtaining new trial and death sentence impacted by appellate review of another inmate's death sentence); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (assumption that plaintiff would engage in illegal activity).

challenges to a regulation or programmatic decision that establishes binding rules governing future government or third-party actions. Gov't Br. at 20-21 & n.14. It cites, for example, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349(c)(3), which requires petitions for judicial review of national five-year oil and gas leasing programs to be filed within 60 days of approval, even though intervening, discretionary government decisions are necessary before drilling may actually occur under the program. *See id.* §§ 1337 (granting a lease); 1340(c)(1)(approving an exploration plan); 1351(a)(1)(approving a development and production plan). Similarly, the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1276(a)(1), requires petitions for review of national performance standards governing strip mining to be filed within 60 days of promulgation, even though a mining company must obtain a permit from the state or federal government before such performance standards will have concrete, on-the-ground impacts in any particular area. *Id.* § 1256(a). Neither standing nor ripeness principles have precluded challenges to OCSLA five-year plans or SMCRA performance standards. ***See Natural Resources Defense Council v. Hodel***, 865 F.2d 288, 303-04 (D.C. Cir. 1988) (OCSLA); *National Wildlife Fed. v. Hodel*, 839 F.2d 694, 703-16 (D.C. Cir. 1988) (SMCRA).

Similarly, Article III presents no obstacle to judicial review of this forest plan challenge. Indeed, in contrast to these other statutory schemes, the Forest Service can implement its forest plan regardless of the actions taken or not taken by independent third parties. In sum, because the forest plan's zoning regime and management objectives dictate not only which activities are permissible in particular areas, but also which ones are necessary to achieve the plan's objectives, plaintiffs' challenge to the plan's multiple use determination and zoning regime is justiciable.

C. Deviations From The Plan Due To Superseding Direction Or Law Do Not Render This Case Moot or Otherwise Nonjusticiable.

Both the Forest Service and the Ohio Forestry Association suggest that the justiciability of this case is undermined in hindsight by the Forest Service's deviations from the plan in recent years. Gov't Br. at 30-31 n.23, 40; Pet. Br. at 22-23. However, the converse is true. When plaintiffs filed this case in 1992, their administrative appeals had been denied, resulting in a final agency action ripe for review.

Moreover, from 1988 until March of 1992 when plaintiffs filed this case, the Forest Service proceeded with more than 40 timber sales, corresponding roughly to the plan's projections of the number of sales and types of logging methods both overall and in particular management areas. *See* Forest Service, Information on Timber Sales Sold on the Wayne National Forest, 1988-1997; LRMP, Table A-1. Indeed, before the filing of this case, the Forest Service proceeded with over 30 even-aged management timber sales to meet the plan's objectives of producing timber and converting mature forest into pasture-like habitat for game species outside management area 6.2. Two such timber sales proceeded in management area 6.1, which, although set aside for nonmotorized recreation, nonetheless is subject to logging under the plan. *See also* Fiscal Year 1989 Monitoring and Evaluation Report, *supra* at 30 (countless other activities proceeded in accordance with the plan). The plan's early track record underscores the plan's determinative effect and the harm that had already occurred to plaintiffs' interests when they filed this lawsuit.

The Forest Service's subsequent divergence from the plan occurred because of intervening national policy direction

limiting clearcutting and appropriations riders beginning in fiscal year 1991 prohibiting the level of clearcutting envisioned under the plan. *See* Memorandum from F. Dale Robertson, Chief of Forest Service, to Regional Foresters, Re: Ecosystem Management of the National Forests & Grasslands (June 4, 1992) (directive would likely restrict clearcutting to 70% of 1988 levels); *see, e.g.*, Department of the Interior & Related Agencies Appropriations Act of 1991, Pub. L. No. 101-512, 101st Cong., 2d Sess., Tit. II, 104 Stat. 1942 (1990) (limiting clearcutting to 25% of 1989 levels). The legislative history to the first appropriations rider explains that Congress disagreed with the forest plan's emphasis on clearcutting and other even-aged logging and directed "that clearcutting must be reduced on . . . the Wayne National Forest[] to prevent damage to sensitive lands, decreases in visual quality, and fragmentation of forested lands." H. Conf. Rep. No. 101-971, 101st Cong., 2d Sess. 56-57 (1990). Logging levels subsequently declined because of the superseding directive and laws, not as a result of individual timber sale decisions.

The fact that a later change in the law may override a forest plan does not render a challenge to the plan upon its adoption nonjusticiable. Instead, the change may render such a challenge moot, if it fully supplants the challenged aspects of the plan. Here, the Wayne Forest Supervisor has now decided to overhaul the plan to bring it in line with the superseding changes in direction. *See supra* at 14. Once the existing plan is superseded by a revised plan, this case will be moot. *See County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (case moot where intervening "events completely and irrevocably eradicated the effects of the alleged violation"). However, as long as the old plan is still being implemented, it embodies the controlling management regime and thus, it continues to be properly subject to challenge.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE WAYNE FOREST PLAN IS ARBITRARY AND CAPRICIOUS.

A. The Wayne National Forest Plan Arbitrarily Favors Logging And Motorized Recreation Over Wilderness Recreation.

The Sixth Circuit's holding that the Wayne forest plan is arbitrary and capricious is amply supported by the record. As the court of appeals observed, the Forest Service "arbitrarily undervalu[ed] the recreational value of wilderness," ignored the widespread availability of cut-over habitat in and around the Wayne National Forest, and thereby "created a very distorted picture of the Wayne National Forest . . . [and became] improperly predisposed toward clearcutting." Pet. App. at 5a-6a. By ignoring public demand for wilderness and the prevalence of game species and hunting in the region, the plan reached a multiple use determination that arbitrarily endorsed even-aged logging in order to create even more habitat for game species. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (arbitrary and capricious to ignore relevant evidence and to justify decision with reasoning that runs counter to the evidence).[17]

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[17] The Sixth Circuit's finding of bias referred to this arbitrary cost-benefit analysis and is well-documented in the record. Pet. App. at 3a, 5a-6a. Any broader statement about "opportunities for the intrusion of bias" is *dictum* not subject to review by this Court. Pet. App. at 7a; *id.* at 9a (concurrence described speculation about overall Forest Service bias as "unnecessary" to the decision); *see Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 n.7 (1982) (Court refused to review broad statements in court of appeals decision pertaining to university programs not directly at issue in the case).

Under the second stage of NFMA's three-stage suitability analysis, the Forest Service assessed the direct costs of and receipts from the options for the forest's timber program. *See* 36 C.F.R. § 219.14(b). In doing so, the agency projected that the bulk of the timber program on the Wayne National Forest would lose money, and its initial analysis of the monetary costs and benefits alone showed that *none* of the forest should be assigned to timber production. DEIS at B4-8 to B4-13; B6-24; B6-30.

Under NFMA, money-losing timber sales may be justified only if they promote other forest objectives. 36 C.F.R. § 219.14(c). Accordingly, in the third stage of the NFMA suitability analysis, the Forest Service purported to assess the extent to which logging could be justified for its benefits to other forest uses, such as outdoor recreation and wildlife habitat. 36 C.F.R. § 219.14(c); 219.12(e)-(h).[18]

To justify money-losing timber sales, the Forest Service concluded that clearcutting and other even-aged logging would promote such non-economic benefits as biodiversity, recreational opportunities, and visual quality in the form of open vistas. *See* ROD at 21; FEIS 2-16; DEIS 2-86. In particular, the Forest Service lauded clearcutting's benefits to hunting and chose this type of logging as a

[18] Ohio Forestry Association (at 36-37) mistakenly reads *United States v. New Mexico*, 438 U.S. 699 (1978), as holding that MUSYA elevated timber production over other forest uses. To the contrary, *New Mexico* recognized that MUSYA "broaden[ed] the purposes for which the national forests [would be] administered" to include recreation, fish, and wildlife. *Id.* at 713. The language embraced by petitioner pertained to the Court's determination of the extent to which the Organic Act - the statute establishing certain national forests, but not the Wayne National Forest - impliedly reserved water rights. *Cf.* Weeks Act, 16 U.S.C. § 515 (authorizing establishment of national forests, including the Wayne National Forest, to protect watersheds of navigable streams).

preferred method for converting mature forest into foraging habitat for game species. FEIS 2-16 ("hunters benefit from increases in game populations due to habitat improvements obtained through timber harvest by the clearcutting method"). As a consequence, logging became the mechanism for promoting two plan objectives – timber production and recreation. ROD at 21; DEIS at A-15, B3-43.

Because of this thumb on the benefits side of the scale, logging came to be viewed as overwhelmingly beneficial and the dominant tool for implementing the plan. Indeed, the Forest Service concluded: "[T]he most economically viable means of achieving desired wildlife habitat diversity in portions of the Forest is through timber harvest." ROD at 15. Settling on the most effective means to convert mature forest into pasture, the plan favored even-aged logging, which removes all or nearly all trees in a block. ROD at 15, 20, 28-29. It was but a small step to prefer clearcutting over other even-aged methods.

NFMA, however, charges the Forest Service with selecting the plan "alternative that comes closest to maximizing net public benefits," including recreation and environmental protection. 36 C.F.R. § 219.12(f). In order to make such a selection, the Forest Service must assess the impacts of logging on *all* forest uses, not simply on those uses that may be promoted by logging. *Id.* §§ 219.12(g)(1) (suitability analysis must calculate both economic and noneconomic benefits, including wilderness and protection of environment); 219.21(d) (Forest Service must assess impacts of recreational activities on other multiple uses and quality of experience). Contravening this mandate, the Forest Service arbitrarily placed a high value on wildlife and recreational opportunities that thrive as a result of logging without considering the costs of these activities to recreation and wildlife that depend on undisturbed forest. Under this skewed approach, it is not surprising that the plan alternative

that emphasized wilderness recreation and maintaining the forest in its natural state ranked the lowest in the value assigned to wildlife and recreation benefits. ROD at 31; DEIS B8-8, B3-39.

The Forest Service defines areas suitable for wilderness recreation, which it calls "semi-primitive non-motorized recreation," as blocks of 2500 acres or more in a predominantly natural environment, where concentrations of users are low, signs of human activity are subtle and infrequent, and motorized use of all roads is prohibited. LRMP at 4-124; DEIS E-23. By definition, therefore, even-aged logging, motorized recreation, and other activities that interfere with the natural environment or fragment the landscape have adverse impacts on wilderness recreation. Inexplicably, although the Forest Service at one point acknowledged that logging, particularly clearcutting, interferes with wilderness recreation, *see* LRMP at 3-2, its suitability analysis failed to incorporate the *costs* of logging to old-growth species, to wilderness recreational opportunities, or to those who prefer the visual quality of old-growth forest to that of a clearcut. *See* ROD at 31.

The agency's suitability analysis rested on this one-sided cost/benefit assumption, even though the agency recognized the high demand for wilderness recreation: "Many people look to the forest to provide a place for recreation where human presence and developments are not readily evident. Elsewhere in the State, this type of recreation is in short supply." LRMP at 3-2; *see also* ROD at 10. Indeed, the agency identified "a state shortage for many forest type recreation opportunities:"

> Boating, camping, fishing and hiking are activities which are popular with a great portion of Ohio families, and only about 50 percent of the demand is being met by current facilities. . . . Larger "blocks" of

> public land which can support activities that allow people to get away from vehicles, businesses, and crowds are in demand.

DEIS 3-26. Despite this unmet demand, the Forest Service viewed logging exclusively as beneficial for recreation and biodiversity.

Not only did the Forest Service simply assume that logging would provide unmitigated benefits, despite its interference with wilderness recreation, but the agency also ignored the extent to which existing conditions already satisfy demand for various types of nonwilderness recreation. *See* 36 C.F.R. § 219.21(e) (plan alternatives must be formulated to avoid duplication of recreational opportunities on state and private lands). Cut-over habitat and the species that thrive in such habitat already exist in relative abundance on the land surrounding the Wayne National Forest. ROD at 16 (existing open, agricultural, and young timber forests on state and private land provide abundant game habitat). In contrast, recreational opportunities and wildlife species that depend on large, undisturbed tracts of forest are in short supply. Indeed, the Forest Service interdisciplinary team — the agency's own experts — asserted that the local value of wilderness recreation greatly exceeded the value used in the agency's suitability analysis "because of the limited opportunity [for wilderness recreation] in southeastern Ohio." DEIS at B4-17.

Moreover, in a 1985 decision on a forest plan appeal, the Secretary of Agriculture elaborated on the suitability analysis required to justify money-losing timber sales. *USDA Decision on Administrative Appeals of Forest Plans for the San Juan, Grand Mesa, Uncompahgre, & Gunnison National Forests*, at 6 (1985) ("San Juan Decision") (Sierra Club Record, Vol. 3, Tab 78). In particular, the following questions must be addressed:

> Are the non-timber multiple use benefits to be achieved through the timber program really needed?
>
> Do projections of demand for these non-timber objectives support the need for the Federal expenditures required to achieve them?
>
> Is the timber program as currently proposed actually the most cost effective way to achieve the non-timber multiple use objectives of the plan?

Id. at 8-9. Other forest plans have been found defective for failing to conduct this analysis. *See Friends of the Boundary Waters Wilderness v. Thomas*, 53 F.3d 881 (8th Cir. 1995) (administrative appeal decision remanded plan for further analysis of below-cost sales); *Citizens for Environmental Quality v. Espy*, 731 F. Supp. 970, 986-88 (D. Colo. 1989) (arbitrary for forest plan to sidestep this analysis).

Here, the Forest Service failed to conduct the required analysis. Instead, it assigned positive values to logging as contributing to recreational goals, without assessing the costs of logging to wilderness recreation or the already ample supply in the region of recreational opportunities and wildlife that benefit from logging.

As a result of over-emphasizing logging and under-emphasizing wilderness recreation, only 10% of the forest is designated for undisturbed wilderness recreation. Conversely, five of the largest management areas, covering over 75% of the forest, are designated for off-road vehicle use and/or even-aged logging – both of which interfere with wilderness recreation. LRMP at 4-83, 4-91, 4-97, 4-104, 4-119; *see also* ROD at 18 (plan made even-aged logging the primary logging method on 80% of the forest suitable for logging); LRMP at 3-5 (same).

In its brief, the Forest Service points to an increase in the acreage assigned to wilderness recreation in the final plan.

Gov't Br. at 48-49. Even after that increase, however, the plan met only half of the projected demand for such recreation. ROD at 29. In contrast, the plan would satisfy 95% of projected demand for hunting, 100% of the demand for off-road vehicle use, and 86% of the demand for developed recreation. LRMP at 2-4 to 2-5. The Forest Service's band-aid approach did not address the crux of plaintiffs' objection: that the entire multiple use determination was fundamentally skewed by the undervaluation of wilderness recreation, the failure to consider the prevalence of hunting and motorized recreational opportunities elsewhere in the region, and the consequent assignment of far too little of the forest to wilderness recreation.

B. The Court Need Not Reach the Clearcutting Optimality Issue.

This Court need not decide what analysis must be undertaken in a clearcutting optimality determination because the optimality of particular logging methods in various ecological conditions is not at the heart of this case. 16 U.S.C. § 1604(g)(3)(F). Instead, plaintiffs' grievance is with the plan's multiple use determination which establishes objectives for the forest's desired future condition, that can only be achieved through even-aged logging that converts mature forest into pastures and short changes wilderness recreation. *See supra* at 41-46; 36 C.F.R. § 219.27(b)(1) (logging prescriptions must be best-suited method to meet multiple use goals for the area).

The Forest Service's overemphasis of logging's benefits to game habitat and recreation predetermined a site-specific preference for even-aged logging, and even for clearcutting as the even-aged management technique of choice. As the Sixth Circuit concluded, however,

"clearcutting loses its value" in the "particular environment of the Wayne National Forest because it will not stimulate the recreational opportunities in demand and. in fact, will harm fishing and hiking." Pet. App. at 6a. A renewed suitability and multiple use determinatien that properly values wilderness recreation would almost certainly eliminate the plan objectives and incentives that favor clearcutting.

On its face, the Wayne forest plan purported to determine that clearcutting is the optimal logging method for certain tree types, slopes, and soil conditions. LRMP, App. C. However, the Forest Service subsequently backtracked in its decisions on the plan administrative appeals, in the Chief's clearcutting directive, and in the Forest Supervisor's promise to revamp the plan's logging program. *See* Pet. App. at 76a, 98a-99a; *see supra* at 14, 39-40. Accordingly, for an ultimate resolution of this case, it may be unnecessary to review the plan's clearcutting optimality analysis.

The Court need not reach out to decide the clearcutting optimality issue in the abstract based on a fear that the Sixth Circuit decision will revolutionize NFMA's approach to clearcutting. Pet. Br. at 25-26. Ohio Forestry Association makes much of the Sixth Circuit's statement that NFMA limits clearcutting to exceptional circumstances. Br. at 36-48. Whether NFMA favors or disfavors clearcutting and even-aged logging is no more than a semantical debate over how to characterize NFMA's constraints. NFMA itself lays out the applicable standard: even-aged logging can be used only where it is "appropriate' to meet the plan's objectives, it complies with limits imposed on the maximum sizes of logging blocks, and the logging is compatible with environmental resource protections and regeneration of forest stands. 16 U.S.C. § 1604(g)(3)(F). In addition, clearcutting may be used only where "it is determined to be the optimum method . . . to meet objectives and requirements of the relevant land management plan." *Id.* § 1604(g)(3)(F)(i).

Even the Fifth Circuit decision embraced by petitioners construed this mandate to limit unfettered even-aged management and clearcutting:

> To be sure, these restrictions reflect a congressional wariness towards even-aged management, constraining resort to its use. The sluicing effect of the required inquiries might be described as making a decision to employ even-aged management more difficult.

Sierra Club v. Espy, 38 F.3d 792, 800 (5th Cir. 1994).[19]

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[19] Contrary to the arguments of petitioner and its *amici*, NFMA imposes constraints on clearcutting, and its legislative history confirms that Congress intended to do far more than repeal the provisions of the Organic Act that led to injunctions against clearcutting. In fact, Congress rejected several competing bills that proposed such a simple, one-sided fix. 122 Cong. Rec. 27,648 (1976) (statement of NFMA co-sponsor Sen. Humphrey). While Congress also rejected bills favoring uneven-aged management, those bills would have gone much further than petitioner admits (at 45 n.24) and either altogether prohibited even-aged logging in the eastern mixed hardwood forests or mandated that uneven-aged logging be dominant on such forests. 122 Cong. Rec. 27,625 (1976); *Sierra Club v. Espy*, 38 F.3d at 799.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

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No. 97-16

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents have chosen not to waste words in defense of the standing theory they presented in their Complaint and affidavits in the courts below, or in defense of the decision of the Sixth Circuit as it was actually rendered on the merits. Instead, they offer a range of theories under which they assert standing to challenge a forest plan *might* be found, but none of which has much to do with the claims that they actually made in this case. Even the theories they *now* tender reflect a fundamental misunderstanding of standing and ripeness principles set forth in this Court's cases.

On the merits, they urge this Court to disregard the Sixth Circuit's bias discussion as *dicta*. Then, with no sense of the irony in their own plea, they urge *this Court* not to "reach out" to address the panel's ruling on clearcutting, on the theory that the clearcutting issue should not be decided "*in the abstract*." Resp. Br. at 48 (emphasis added). Instead, Respondents seek to demonstrate that the Wayne Forest Plan is "arbitrary" because planners did not value wilderness recreation in the way Respondents prefer.

I. Respondents' Complaint Is Not Justiciable

1. Petitioner and the Solicitor General share common views that: (1) no concrete Article III controversy exists in connection with Respondents' facial challenge to the Wayne Forest Plan; (2) Respondents' facial critique of the Plan was not ripe for review; (3) a challenge to a specific ground-disturbing action directly affecting Respondents, undertaken under the Plan, would likely present a ripe controversy; and (4) in connection with a challenge to a particular action undertaken under the Plan, a court might well have occasion to address the lawfulness of the portions of the Plan material to the contested action, though the scope of review and relief would depend on the facts of the case.

2. Respondents' Complaint and the Sixth Circuit's decision focused on those aspects of the Plan that bear upon timber harvesting. As shown in the opening briefs, however, Respondents have no standing to challenge the Plan in isolation based on "injury" that may later result from a subsequent decision to hold a timber sale. Pet. Br. at 11-14; Fed. Br. at 22-24. Because forest plans do not dictate that timber harvesting *will* take place on any particular tract or in any particular manner, they do not create any imminent, direct, or particularized environmental injury. It is speculative to conclude that a change in the Plan's guidelines would redress any personal environmental injury at a specific location.

Moreover, Respondents' facial challenge is simply not ripe for review. Too much has to happen -- and might not happen -- before Respondents would be affected in any concrete way by any aspect of the Plan they challenge. A court cannot anticipate in what form and locations the ground-disturbing actions feared by Respondents might take place. Any timber sale would require a second stage of decisionmaking and a wide range of site-specific considerations that bear importantly on the way the Plan is interpreted and applied.

Respondents now appear largely to disavow injury from timber harvesting as the basis for standing. They do *not* explain, however, how their new non-logging theories of standing could possibly justify, in either Article III or ripeness terms, their assault (and the Sixth Circuit's holdings) on the timber harvest-related aspects of the Plan, including the standards for even-aged harvesting.[1] Respondents' basic

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[1] Respondents (at 22-25) say that challenges to the nomination of land for Wilderness Act designation, or the Plan's conclusions on the allowable sale quantity ("ASQ") of timber, or the Plan's manner of addressing issues of species viability, each might present the kind of (continued...)

approach appears to be one in which litigants contrive some colorable theory that gets them into court, following which they are free to mount challenges, willy-nilly, to any aspect of the forest plan that catches their eye.

Respondents' approach highlights their failure -- and the Sixth Circuit's failure -- to appreciate the duty of restraint that justiciability principles impress on the federal courts. The purpose of a federal lawsuit is to afford concrete relief to a litigant, not to provide a forum for making forest policy. Where a broad, multifaceted, planning document -- even one that provides important guidance for future actions -- is the subject of an abstract facial challenge, it is easy to lose focus on the primary function of a lawsuit and to engage, as the Sixth Circuit did, in the kind of broad policymaking for which the federal courts are constitutionally ill-suited.

3. Because zoning is sometimes held subject to challenge, Respondents try to analogize a forest plan to a zoning ordinance. To this end, they recast their lawsuit as a challenge to the Plan's multiple use allocations. Respondents are correct that, like zoning, the Plan's management area designations describe permissible uses within geographic areas. But that is the limit of the analogy.

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[1](...continued)
claim that can be adjudged in the context of a facial challenge to a forest plan. All of these issues are presented here hypothetically; none of these issues is raised in the Complaint or addressed in the opinion under review. Respondents simply fail to appreciate the basic point: Just as the courts cannot address merits issues in the abstract, they cannot address justiciability issues in the abstract. Whether Respondents could raise a viable claim concerning these issues will depend on the precise nature of their claim on the merits, the precise agency action being challenged, and the nature of their alleged injury.

A zoning ordinance typically sets forth restrictions on a private party's use of his or her own property. In contrast, a forest plan sets forth the government's intentions for the use *of its own lands*. The plan may *indirectly* affect private interests, but a suit based on the possibility of *indirect* effects of the government's plans for the use of its own lands raises standing concerns. Where the challenge is to the "lack of regulation[] of someone else, much more is needed" to ensure an Article III controversy, including an "imminent" injury that has a "high degree of immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562, 564-65 & n.2 (1992). Further, this Court has reviewed zoning matters only where present injury exists without need of further application of law to facts, in contrast to Respondents' contingent injury here. *E.g.*, *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1667 (1997).

4. Respondents (at 23, 31-34) offer several new candidates for "injury" said to arise from the Plan's land use classifications. Respondents say they are "harmed by a variety of non-logging activities approved by the plan's land use allocations, such as motorized recreation, herbicide use, grazing, utility pole corridors, roadbuilding, and maintenance regimes, as well as by the plan's failure to direct more road closures to promote undisturbed backcountry recreation."

a. Respondents' effort to rely on these non-logging injuries is misplaced. The Complaint, and Respondents' recent affidavit filings in the district court (which they invoke here), rely upon injury from timber harvesting and related road construction. Injuries from non-logging activities such as off-road vehicle use, utility construction, and *not* closing roads were *not* asserted and are *not* part of this case. *See* JA 13-26; Affidavits of Messrs. Ostrander, Scott, and Tockman (lodged). Further, the non-logging injuries would not provide standing to adjudge the timber issues decided by the Sixth Circuit (e.g., even-aged harvest only in "exceptional circumstances").

b. Respondents' non-logging hypotheticals suffer from many of the same defects as do their timber harvest theories. Where an environmental group plaintiff challenges the multiple use allocation at the plan level by seeking to increase the *percentage* of lands allotted to different multiple uses: (1) plaintiff would not be injured where the land allocated to a particular use does not match up to the areas actually used by plaintiff; and (2) it remains too speculative to conclude that a court order requiring a higher percentage of lands for wilderness recreation would redress plaintiff's environmental injury; the additional acres could come from anywhere in a national forest (which range in size from hundreds of thousands to millions of acres) and may not include the areas used by plaintiff. At bottom, only a proposal to develop a particular tract in a particular way provides the imminent, concrete, redressable injury-in-fact needed for standing based on environmental injury. *Lujan v. Defenders of Wildlife*, 504 U.S. at 564-65 and n.2 (1992). Respondents' "someday, somewhere in this vicinity" allegations of environmental injury do not satisfy Article III. *See id.* at 564-66.

c. Moreover, as with Respondents' timber harvesting theory of standing, the injury from most of the various new activities that Respondents say they fear -- e.g., road or utility construction -- would not occur until after a second stage of site-specific reviews and decisionmaking. Such "injuries" are contingent and not imminent. Respondents' "no development" wish remains fulfilled until a separately challengeable development decision occurs.

Respondents conceive a theory designed to overcome the fact that they will ordinarily suffer no injury until after a second stage decision on a specific project. They seize (at 34) on our concession that an off-road vehicle enthusiast who had used a forest area likely would have standing to contest a plan provision closing the area to such use. Respondents seek to

flip that concession, theorizing that by *not* designating more area in the management area they prefer, known as MA 6.2, the Plan has left more area *ineligible* for "consideration" for added protection in the form of road closings or bans on off-road vehicle use. Under this "ineligible for future consideration for affirmative protection" theory, they argue that the failure to afford this affirmative protection will not undergo any second-stage decision and urge that the absence of a formal second-stage decision should bear on the issue of ripeness for review.

Respondents' argument does not, of course, address the basic problem: a change to the percentage allocation will not certainly affect any specific parcel on which Respondents recreate, let alone actually result in some particular road within the parcel ever being closed.

Moreover, Respondents' hypothetical is just that; it does not represent either the legal claims or the facts of this case. The Plan does not close roads even within MA 6.2; it provides for future *consideration* of 650 miles of road closings throughout the entire national forest, not just in MA 6.2. *See* Plan at 3-7, 4-127. Thus, not only must Respondents overcome their basic Article III difficulty in tracing a change in the percentage allocation of land to a parcel of land that concerns them, and then to a project that may never take place, Respondents are at most concerned with the differential probability that roads will be closed in an MA 6.2 area rather than in some other area.[2]

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[2] Respondents (at 19-21, 26, 29, 32) cite several cases finding Article III jurisdiction where business plaintiffs were the subjects of regulatory schemes. Respondents seek our position on whether the timber industry might have standing to challenge a forest plan. No issue of industry standing is presented in this case. Whether industry (continued...)

Further, Respondents' argument that some aspects of the Plan's classification scheme may never be reviewable is simply not sufficient to overcome constitutional standing problems, nor is it a decisive point even as to ripeness. Certain policy decisions may not be reviewable because they cannot be presented in the context of the kind of case or controversy that the courts are comfortable addressing, or because the policy decision never results in a discrete injury to anyone.[3] This reflects the limited authority of the federal courts. The "assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."

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[2](...continued)
has standing likely depends on the particular claims being asserted and the facts regarding injury. For example, a sawmill owner dependent on national forest timber might establish justiciability to challenge the immediate closing of an area in which he or she had already successfully bid on a timber sale or in which a sale had previously been planned, if the sale would prevent mill closure or loss of business. Nonetheless, lower courts have found timber interests lack standing in somewhat analogous circumstances. *E.g., Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 808-09 (11th Cir. 1993).

[3] Respondents (at 22-23, 34) seem to revert to the theory that knowing there is land out there that is not going to receive affirmative protection is injury enough, citing a case holding that the "loss of affirmative" protection under a forest plan creates a cognizable Article III injury, *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992). This kind of abstract, ideological injury has repeatedly been rejected as a basis for standing. *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). Respondents' generalized concern with the "immense tract of territory" covered by the Plan provides no basis for standing. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 886-89 (1990). The psychological injury of knowing that certain lands have not been classified so as to offer affirmative protection is simply "too abstract" to be "legally and judicially cognizable." *Raines v. Byrd*, 117 S. Ct. 2312, 2317-18, 2320-22 (1997).

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 489 (1982).

d. The standing defect created by Respondents' failure to specify any particular parcel or particular road gives rise to a cautionary note. Respondents cannot overcome that defect in their theory by simply alleging they are concerned about some specific parcel of land or road and that, if they are correct on the merits, the specific parcel would be classified into MA 6.2 or the road would be closed. There is no viable legal theory that would result in that type of relief. No matter how one parses the NFMA, the Forest Service possesses a broad discretion to determine the classification of particular parcels as part of the planning process. *See* Pet. Br. at 34-43.

5. On the issue of Article III standing, Respondents invoke the discussion of causation in *Bennett v. Spear*, 117 S. Ct. 1154 (1997). They highlight that the challenged action need not be the "very last step in the chain of causation" where it "alters the legal regime" and has a "coercive effect upon the action of someone else." Resp. Br. at 36, quoting *Bennett*. They note that a plan establishes binding rules that "substantially influence" subsequent actions. *See* 16 U.S.C. § 1604(i) (decisions must be "consistent" with the plan).

As discussed in our opening brief, Respondents' facial challenge bears little resemblance to *Bennett*. In *Bennett*, the injury to be averted was quite specific -- a restriction on water from a reservoir available to irrigate plaintiffs' lands. The nature of the government action that threatened injury was likewise specific. The question was whether standing was precluded by the existence of a link in the chain of causation between the "biological opinion" and the final action implementing that decision by reducing available water. Because of the close, practical, and legal way that the

biological opinion controlled the ultimate government decision, such that a favorable decision would redress plaintiffs' feared injury, the Court found the additional step in the chain of causation to be no bar to standing.

Here, unlike *Bennett*, Respondents have difficulty with each aspect of the standing inquiry. They complain of no *specific* or concrete injury; no injury is imminent; there is no close connection between the relief that can be afforded and any benefit to them. Respondents here assert only that some vaguely defined change to the Plan might result in some vaguely defined benefit to them. Indeed, the statutory requirement that actions be "consistent with" the Plan is also not likely to determine the outcome of any future decision to offer a timber sale, or build a road, or allow construction of a utility line. Rather, the Plan's general prescriptions provide only some of many factors that -- along with a range of other legal requirements, other Plan requirements, and site-specific environmental and economic considerations -- will govern any particular decision under the Plan. *See* Pet. Br. at 12-16.

Under Respondents' argument, the mere fact that a regulation is final and binding, and thus is likely to have *some* legal effect on unspecified future action, would create standing. But the existence of a binding rule only begins the inquiry. The requirements still remain that the Complaint focus on an imminent concrete injury, traceable to the challenged action and redressable by the court.

6. Citing *Defenders*, 504 U.S. at 572-73, Respondents (at 27-28) argue that the question whether the environmental impact statement ("EIS") on the Plan complies with the National Environmental Policy Act ("NEPA") presents a justiciable controversy. In *Defenders*, however, the Court insisted that plaintiff have "concrete interests" affected by the action on which the EIS was prepared. 504 U.S. at 572 n.7

and 573 n.8 ("We cannot agree" that standing exists "solely on the basis of a 'procedural right' unconnected to the plaintiff's own concrete harm"); *id.* at 572-78; *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996) (*en banc*). Because the Plan causes no concrete injury to Respondents, neither does the EIS.

Before a ground-disturbing action and environmental injury can occur, a second-level NEPA document (usually an environmental assessment) must be prepared. *Sierra Club v. Robertson*, 28 F.3d 753, 757-61 (8th Cir. 1994). Other challenges to initial NEPA documents have been found unripe where there would be a second-level NEPA document and a later opportunity for focused judicial review of the totality of NEPA compliance. *See id.; Rapid Transit Advocates, Inc. v. Southern California Rapid Transit Dist.*, 752 F.2d 373, 378-79 (9th Cir. 1985); *National Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259, 263-64 (2d Cir. 1982).

7. On ripeness, Respondents again emphasize (at 17-30) that the Plan is a final agency action. Finality is not determinative. There remains a strong preference for "case-by-case" adjudication that awaits "some concrete action applying" a general policy. *Lujan v. NWF*, 497 U.S. at 894. *See Renne v. Geary*, 501 U.S. 312, 322-24 (1991); *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163-64 (1967). Respondents do not overcome that preference. As previously discussed, before undertaking any ground-disturbing action -- and certainly any timber harvesting activity -- the agency will consider a range of site-specific factors. The way the general prescriptions of the Plan relate to one another, and relate to the site-specific facts, cannot be anticipated by a court in a facial challenge to the Plan. *See* Pet. Br. at 12-15, 22.

a. The deciding factor on prudential ripeness normally is whether the challenged action causes an injury or hardship

that demands immediate redress. *Compare Abbott Lab. v. Gardner*, 387 U.S. 136, 149-53 (1967), *with Toilet Goods Ass'n*, 387 U.S. at 163-67. *See Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57-58 (1993); *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 73, 81 (1978).[4] Respondents (at 21-30) have not pointed to any injury or hardship to themselves that springs directly from the Plan and that could not be redressed if or when a specific ground-disturbing action pursuant to the Plan threatens immediate environmental injury.

b. Respondents assert hardship in proceeding case-by-case and fear that the case-by-case approach may never afford

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[4] The cases Respondents cite in support of their ripeness theory are inapposite. One case merely found that persons with an interest in competing on an equal footing had standing to bring equal protection claims. *Northeastern Florida Chapter Assoc. Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Several of those cases involve regulations that subject the regulated entities to the choice of compliance or potential criminal or civil penalties. *E.g., Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298-301 (1979); *Abbott Lab.*, 387 U.S. at 153-54; *Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 171-72 (1967). Other cases recognize the fact that regulatory requirements may impose immediate economic choices on those subject to the regulation. *E.g., Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 201-02 (1983); *Duke Power*, 438 U.S. at 74-77, 82. Finally, there are a series of cases in which the agency decision is fully determinative of any further decision on implementation , leaving no future discretion in the agency about how the decision is to be applied and will not be significantly affected by case-specific discretionary factors. *E.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140-44 (1974); *Pennsylvania v. West Virginia*, 262 U.S. 553, 593-95 (1923). This last group of cases is readily contrasted with the situation presented here. The Plan requirements have an impact but, by their nature, implementation decisions are highly discretionary and involve a range of factors.

them the opportunity to obtain broad plan-wide relief or trigger expansive judicial pronouncements on agency policy of the kind ventured by the Sixth Circuit. Yet, Respondents' argument only highlights a philosophical difference between Respondents' approach to the use of the courts and the role of the courts envisioned by the Framers and described in this Court's cases.[5]

Faced with a challenge to a specific action, a court may well be able to resolve the controversy by focusing on case-specific facts, without addressing policy issues. Thus, abstract questions about plan provisions may be avoided entirely -- while still affording plaintiffs complaining about specific actions particularized relief. Respondents would undoubtedly see that result as a bad thing. Their objective is to influence policy generally, rather than obtain specific relief. But that

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[5] Though this "case-by-case approach" is "understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection," separation of powers concerns confine a court to addressing issues in a concrete factual situation, absent a legislative directive to engage in broad review. *NWF*, 497 U.S. at 894. Specific legislative directives on expedited judicial review and limitations on later review influenced the results in the lower court cases Respondents cite at 38 and in *Regional Rail Reorganization Act Cases*, 419 U.S. at 138-46.

Respondents also note that the *agency* does not revisit certain plan-level decisions when it considers a ground-disturbing action. The Eighth and Eleventh Circuits have found that a *court* can address the legality of a plan-level decision to the extent necessary to resolve and remedy a site-specific controversy. *See* Pet. Br. at 4, 18-21. The issue in any case is not whether the agency revisits the issue, but when may a court prudently visit the issue.

result simply reflects the limited role of courts in federal policymaking.[6]

II. The Sixth Circuit's Expansive Rulings On Bias, Even-Aged Management, And Semi-Primitive Recreation Represent Serious Departures From The Norms Of Judicial Decisionmaking

1. Respondents (at 41 n.17) say that this Court can ignore the Sixth Circuit's discourse on Forest Service bias because it is *dicta*. They do not defend it.

The Forest Service's alleged bias was the overarching focus of the opinion below. The Sixth Circuit introduced its analysis with references to the presumption of regularity afforded agency decisionmaking, a presumption overcome by bias. The panel's analysis ended with bias, and references to bias appear throughout. Pet App. 5a, 7a-9a. It could only be the panel's view of the Forest Service's inherent bias that explains how it purported to find the Plan arbitrary without citing the administrative record, without identifying or responding to the agency's detailed analysis, and without describing its own analysis, except for reliance on a statutory section fundamentally inconsistent with the proposition for which the

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[6] Respondents (at 29, 39) emphasize that there have already been 40 timber sales under this Plan. The point cuts squarely against them on ripeness. Those sales were important to the Forest Service, to the individuals and businesses that rely on them, and to the communities that share in the proceeds. But they apparently did not violate the law or injure Respondents. Yet, if facial challenges like this one were permitted -- and the Sixth Circuit's decision on the merits were the law -- those non-injurious sales would not have occurred. These facts strongly confirm the wisdom of counseling the federal courts to proceed cautiously in considering broad challenges to forest plans.

court cited it. The panel's view that statutes bias the Forest Service in a judicially meaningful way is insupportable.[7]

2. Respondents also do not try to defend the panel's imaginative rulings that "16 U.S.C. § 1604(g)(3)(F)(v)": (1) requires "even-aged management techniques be used only in exceptional circumstances"; and (2) imports into the NFMA a highly "protective spirit" of wilderness preservation that the Forest Service must presumably employ in each and every policy-based decision. Pet. App. 6a, 8a.

As shown in our opening brief (at 41-46), 16 U.S.C. § 1604(g)(3)(F)(v) neither stands for nor supports either of these propositions.[8] After the Forest Service finds that an even-aged harvest at a particular site is appropriate (under § 1604(g)(3)(F)(i)),[9] (F)(v) requires the Forest Service to

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[7] Even if the panel's foray into institutional bias could be characterized as *dicta*, the impugning of an entire agency is such a radical departure from the appropriate norms of judicial review that it cries out for comment and correction. This Court possesses supervisory authority to dispose of the whole case and every aspect of the decision rendered below in a manner that serves the interests of justice.

[8] Respondents' effort (at 48) to paint the panel's holdings as merely a "semantical debate" on whether the NFMA "disfavors clearcutting" is implausible. Lower courts have already read the opinion as meaning that "the Sixth Circuit held [even-aged management] should be the exception rather than the norm according to the NFMA." *House v. United States Forest Serv.* 974 F. Supp. 1022, 1032 n.20 (E.D.Ky. 1997). *See Fener v. Hunt*, 971 F. Supp. 1025, 1033 (W.D.Va. 1997).

[9] Respondents (at 47-49) confuse the issue presented here when they argue that the Court need not address the "optimality" requirement of § 1604(g)(3)(F)(i), which the panel did not cite. Courts have concluded that this provision requires optimality to be addressed in the (continued...)

consider a range of interests in designing and conditioning the harvest at the site. Neither this section nor any other portion of the NFMA states a preference for recreation or against timber harvesting by even-aged or other techniques.

3. Respondents (at 41-47) nonetheless try to defend the panel's statement that the Plan arbitrarily fails to reserve enough acreage for "wilderness recreation"[10] and makes too much acreage potentially available for timber production. This defense is on economic grounds that are not apparent in the opinion below.

The panel reached its conclusion that the Plan was "arbitrary" only by first arming itself with the dubious beliefs about (1) pervasive agency bias in favor of timber production; and (2) a "highly protective spirit" for wilderness preservation supposedly embodied in the NFMA. So armed, the panel easily found the Plan arbitrary: the Forest Service had not shown any overt *preference* for wilderness or demonstrably renounced its "bias" in favor of timber. Neither of the twin pillars of the Sixth Circuit's analysis withstands even cursory scrutiny. *See* Pet. Br. at 26-43.

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[9](...continued)
context of a specific proposed sale, not the plan. *See* Pet. Br. at 41-43, 47-48. The Senate Report reveals that "optimum" means the most "conducive to reaching the specified goals of the management plan" and that this is a "broader concept than 'silviculturally essential' or 'desirable' - terms considered and rejected by the Committee." S. Rep. No. 94-893 at 39 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6662, 6698.

[10] Respondents and the panel mistakenly refer to "wilderness recreation." The agency concluded the Wayne contains no areas of Wilderness character as defined in the Wilderness Act, 16 U.S.C. §§ 1131-32, or any truly primitive areas. Semi-primitive recreation is the more accurate term in the Wayne. *See* FEIS at 2-65; DEIS at 4-67.

4. Instead, Respondents offer a technical, but no less flawed, theory that the Forest Service failed to satisfy 100% of the demand for wilderness recreation due to alleged economic errors in the timber suitability analysis and some runs of the FORPLAN computer program.[11] Respondents' theory suffers from the same defects as the Sixth Circuit's: it imports into the NFMA a series of preferences and obligations that are nowhere found in the NFMA or its regulations. Those theories fail to acknowledge the broad discretion to make policy choices and technical judgments that the NFMA confers upon the Forest Service. *See generally* Pet. Br. at 31, 34-43; *Amicus* Br. of Alabama Forestry Ass'n at 4-16.

a. No law requires that a forest plan satisfy 100% of the wilderness recreation demand (no matter how calculated) or accords that use any priority over timber production. Though the Plan may have satisfied only 50% of wilderness recreation demand, it is also true that the maximum timber sale volume foreseen by the Plan would have met only 40% of local timber demand. ROD at 19. The final Plan provides for semi-primitive recreation on 27,600 acres and anticipated timber harvesting on a maximum of 7,835 acres. ROD at 6; FEIS at 2-18.

The forest planning process makes choices between often-conflicting multiple uses and user groups, and those choices

[11] FORPLAN is a technical planning aid that, for a given set of economic inputs, will assign lands efficiently to the multiple uses identified in each alternative forest plan to generate the highest Present Net Value ("PNV") for that alternative. FORPLAN does not dictate the selection of a particular forest plan. In selecting a forest plan, the agency strives to maximize "net public benefits," which include non-economic, unquantified environmental amenities like semi-primitive recreation. *See* 36 C.F.R. §§ 219.3, 219.12(f); DEIS at 2-3 to 7, B3-2 to 4, B3-37 to 43, B4-2 to 4.

are entrusted to the Forest Service. The NFMA, MUSYA, and the 1897 Organic Act do not specify the relative weight to be attached to any use, beyond the historic primacy of timber production and watershed protection. Indeed, rather than create enforceable priorities, the NFMA was intended "to get the practice of forestry out of the courts and back to the forests." 122 Cong. Rec. 33835 (Sept. 30, 1976) (remarks of Sen. Humphrey). The Forest Service acted well within the scope of its discretion in the Plan's reconciliation of competing demands and classification for a mix of multiple uses.

b. Respondents assert (at 41, 47) that the Forest Service "ignored" the early successional habitat around the Wayne and "ignor[ed] public demand for wilderness." But this exercise in rhetoric mischaracterizes the record. The "demand" was not "ignored." The DEIS (at 3-2 and 26 to 28) included information on recreation availability throughout Ohio and compared land uses on federal versus non-federal lands.

c. Respondents err (at 42) in stating that 36 C.F.R. § 219.14(c) does not allow "money-losing timber sales." The regulation uses the term "cost-efficient," defined as the most efficient way to meet plan objectives (e.g., below-cost timber sales to provide wildlife habitat and community stability benefits), not above cost. 36 C.F.R. §§ 219.3, 219.14(c)(3); 44 Fed. Reg. 53969 (Sept. 17, 1979).[12]

[12] Because neither the NFMA nor implementing regulations require rigorous economic analysis, Respondents (at 45-46) rely on an internal Forest Service policy (the San Juan decision), which requires special justifications where planners propose to *expand* a below-cost timber program. The Forest Service and district court properly found that this policy does not apply to the Wayne, where a reduced timber sale program was proposed. Pet. App. 35a-36a, 92a-96a. In any case, the San Juan decision is an unenforceable informal agency policy. *See*

(continued...)

Further, the NFMA and regulations do not bar below-cost timber sales or bar the inclusion of such sales in determining suitable timber lands.[13] Instead of following a corporate model of maximizing profits, the NFMA directs that the "harvesting system to be used is not selected primarily because it will give the greatest dollar return." 16 U.S.C. § 1604(g)(3)(E)(iv).

d. The regulations do not require the type of cost-benefit analysis and calculation of opportunity costs (foregone wilderness recreation benefits) that Respondents (at 43-44) demand. *See* 36 C.F.R. § 219.14(b) (analysis of only "direct benefits" and "direct costs" of timber production). Thus, what Respondents say was omitted was simply not required.[14]

12(...continued)
Schweiker v. Hansen, 450 U.S. 785, 789 (1981); *Swanson v. United States Forest Serv.*, 87 F.3d 339, 345 (9th Cir. 1996).

13 *See* Pet. App. 30a-37a, 68a-69a, 90a-92a (district court's and Forest Service's interpretation); ROD at 21 (Wayne timber sale program is cost-effective). Other courts have found that "the inclusion of some 'below cost' timber in the timber base does not by itself constitute an abuse of discretion." *Sierra Club v. Cargill*, 11 F.3d 1545, 1550 (10th Cir. 1993); *Big Hole Ranchers Ass'n, Inc. v. United States Forest Serv.*, 686 F. Supp. 256, 263 (D. Mont. 1988). A "simplistic" approach to timber sales, such as the "amount of profit" after counting the additional costs of environmental analyses and operating constraints on federal lands, "is neither realistic nor particularly helpful in light of the statutory scheme"that makes it rational to invest in below-cost timber sales to remove a pest "infestation" or provide other benefits. *Churchwell v. Robertson*, 748 F. Supp. 768, 776 n.39 (D. Id. 1990).

14 While Respondents *now* question the way that the agency evaluated Wayne forest plan alternatives under 36 C.F.R. § 219.12, no § 219.12 claim was made in the Complaint. The Complaint did challenge the legality of the § 219.14 timber suitability *regulation* (JA 25-26), not its application in the *Plan*, and Respondents do not press
(continued...)

e. Respondents make the same type of mistake when they focus on the computation of Present Net Value, which is an interim exercise in comparing the economically-measurable benefits of alternative forest plans. The PNV computations that Respondents critique had little influence on the selection of the final Plan. The Plan selected in this case had the fourth highest PNV of the forest plan alternatives. ROD at 28.[15]

14(...continued)
that claim here. Further, Respondents are misleading in their effort to make the timber suitability analysis (§ 219.14) part of the evaluation of alternative forest plans (§ 219.12). The stage of the suitability analysis that Respondents focus on occurs *after* the formulation of forest plan alternatives and simply applies each alternative's constraints. 36 C.F.R. § 219.14(c). *See* 47 Fed. Reg. 43033 (Sept. 30, 1982). Thus, the suitability analysis does not drive the selection of a forest plan or its mix of multiple uses. But it is sufficient for present purposes to note § 219.14 does not require that the opportunity costs of timber harvesting, such as foreclosing semi-primitive recreational uses, be part of the agency's economic analysis.

15 In this interim modelling step, providing rough dollar-value comparisons among different plan alternatives, the Forest Service clearly needs broad discretion on how to proceed. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989); *Thomas v. Peterson*, 753 F.2d 754, 762 (9th Cir. 1985) (rejecting a recreation claim); Pet. App. 40a-42a. Since planners did assign a higher dollar value to semi-primitive recreation than to developed recreation and did employ the standard values established by regional willingness-to-pay studies, the values were not biased or arbitrary. *See* DEIS at B4-13. Since the DEIS (at B4-17) disclosed that a higher value for semi-primitive recreation might be justifiable, this fulfilled NEPA's informational purpose. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989).

Agency discretion certainly extends to technical matters, such as whether to address wilderness recreation as an opportunity cost of timber production in PNV estimates (as Respondents (at 43-44) would
(continued...)

The Forest Service's ultimate choice of the Plan is based not on the interim step of comparing the PNVs of plan alternatives, but rather on the more amorphous concept of maximizing "net public benefits," which include unquantified environmental amenities. 36 C.F.R. §§ 219.3, 219.12(f). Here, in arriving at the final Plan, and after looking at the PNV results, the Forest Service added substantial additional land for semi-primitive recreation that it felt was not fairly measured in the economic model, but desirable nonetheless.[16]

Respondents' argument that greater "values" should have been afforded to wilderness recreation as part of the initial economic modeling of PNV simply inserts those interests at a different stage of the decisionmaking than where the Forest Service considered them. The fact remains the Forest Service plainly did consider the relevant issues. There is no basis upon which to suggest that its consideration was arbitrary.

CONCLUSION

The judgment of the Court of Appeals should be vacated or reversed, as appropriate.

15(...continued)
like), or whether to address such recreation in the net public benefits assessment and as a benefit where it is featured in an alternative forest plan (as the Forest Service did here, *see* page 20).

[16] *See* ROD at 28-30; DEIS at 2-77 to 84, B8-13 to 14; FEIS at 2-8; Pet. App. 123a-124a; Pet. Br. at 6. Since more people picnic, hike, and hunt in *roaded* areas of a national forest, the visitor-use days, and the total recreational dollar values for those activities, will be higher than for semi-primitive recreation. This results in a higher PNV. *See* DEIS at 2-84. Thus, Respondents' interests are advanced when the Forest Service addresses semi-primitive recreation as an unquantified contributor to net public benefit.

Respectfully submitted,

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No. 97-16

In the Supreme Court of the United States

OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC., PETITIONER

v.

SIERRA CLUB, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS

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REPLY BRIEF FOR THE FEDERAL RESPONDENTS

Respondents contend that the Forest Service's adoption of the Land and Resource Management Plan (LRMP) for the Wayne National Forest was arbitrary and capricious because the plan allocates insufficient land to "wilderness recreation," by which they appear to mean hiking, camping, or similar activities conducted in a semiprimitive environment largely removed from human contact or evidence of prior human habitation. See, *e.g.*, Resp. Br. 9.[1] Respon-

[1] Respondents' use of the term "wilderness recreation" is at least potentially misleading. The Wilderness Act, 16 U.S.C. 1131-1136, defines the term "wilderness" to include federally owned land meeting specified criteria. 16 U.S.C. 1131(c). The Forest Service concluded that no lands within the Wayne National Forest satisfied the statutory criteria, see Final Environmental Impact Statement (FEIS) 2-65, and respondents have not sought to challenge that conclusion. Respondents use the term "wilderness recreation" to describe activi-

dents' plan-level challenge is not justiciable. If this Court concludes that the Wayne LRMP is subject to judicial review in the context of a facial challenge, the judgment of the court of appeals should be reversed on the merits, since the plan reflects a rational balancing of competing objectives.

I. Respondents' facial challenge to the Wayne LRMP is not justiciable. In contending that the LRMP fails to allocate a sufficient portion of the forest to "wilderness recreation," respondents conflate two distinct objections to the plan. First, respondents argue (and have argued throughout this litigation) that the plan overemphasized timber harvesting at the expense of other uses of the forest, by designating too many acres as suitable for timber harvesting and by setting the maximum allowable sale quantity (ASQ) at too high a level.[2] Second, respondents contend that with the exception of Management Area 6.2 (which comprises approximately 10% of the Wayne National Forest), their enjoyment of the forest will be impaired by a variety of activities *other than* timber harvesting. See, *e.g.*, Resp. Br. 31 (stating that respondents' interests "are harmed by a variety of nonlogging activities approved by the plan's land allocations").[3]

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ties characterized by the Forest Service as "semiprimitive, nonmotorized recreation." See Resp. Br. 44 ("The Forest Service defines areas suitable for wilderness recreation, which it calls 'semi-primitive non-motorized recreation,' as blocks of 2500 acres or more in a predominantly natural environment, where concentrations of users are low, signs of human activity are subtle and infrequent, and motorized use of all roads is prohibited.").

[2] Respondents' complaint asserted both that the Wayne LRMP overemphasized timber harvesting at the expense of other uses of the forest, and that the plan improperly relied on clearcutting as the predominant method of harvesting. See J.A. 19 (alleging that "the plan lacks site-specific determinations that clearcutting is the 'optimal' method of harvesting timber in the Wayne" and that "the plan fails to demonstrate the **optimality** of clearcutting as the method of harvesting timber for the Wayne as a whole"). The court of appeals concluded that the Forest Service's "planning process was improperly predisposed toward clearcutting" and that the agency "would utilize even-aged management logging as if it were the statutory rule," in derogation of a purported statutory requirement that "even-aged management techniques will be used only in exceptional circumstances." Pet. App. 5a, 6a. In this Court, however, respondents appear largely to have abandoned their challenge to the Wayne LRMP's projections concerning the likely *methods* of timber harvesting. See, *e.g.*, Resp. Br. 47 ("This Court need not decide what analysis must be undertaken in a clearcutting optimality determination because the optimality of particular logging methods in various ecological conditions is not at the heart of this case.").

[3] Lands within Management Area 6.2 are not included in the timber base, Plan 4-126, and the plan projects that all roads within those lands will ultimately be closed to motorized traffic. Plan 4-127. Within Management Area 6.2 "[t]here is a high probability of experiencing considerable isolation from the sights and sounds of people, independence, closeness to nature, tranquility, and self-reliance." Plan 4-124. Management Area 6.2 contains 17,217 acres of land, Plan 4-176—approximately 10% of the 176,787 federally owned acres in the Wayne National Forest. Plan 4-180.

Respondents' statement that the Wayne LRMP "protect[ed] only 10% of the forest for undisturbed backcountry use" (Resp. Br. 15) refers to the size of Management Area 6.2; it should not be misconstrued as an assertion that only 10% of the forest was protected from *timber harvesting*. Over 44,000 acres of forest land—*i.e.*, approximately one-fourth of the federally owned land within the Wayne National Forest—were designated by the plan as not suited for timber production. Plan 4-180. And while the Wayne LRMP designated 126,107 acres as suited for timber production, it projected that only 7,835 acres would actually be harvested during the years 1986-1996. *Ibid.*

As we explain below (pp. 4-11, *infra*) and in our opening brief (at 28-30), the plan provisions governing timber harvesting activities in the Wayne National Forest are not subject to judicial review in the context of a facial challenge to the plan itself, since they neither require nor authorize the Forest Service to undertake any timber harvesting project without a further, individualized assessment of its likely consequences. Respondents' contention that their use of the Wayne National Forest is impaired by *non*-logging activities is not properly before this Court, since respondents did not advance that argument in the courts below.[4]

A. The National Forest Management Act of 1976 (NFMA) requires the Forest Service, in developing LRMPs for units of the National Forest System, to identify lands "not suited for timber production." 16

[4] As the Forest Service recognized in developing the Wayne LRMP, the desire to make semiprimitive recreation available must be balanced against many competing uses of the Forest—including competing recreational uses having nothing to do with timber production. See Plan 3-2 ("Competing demands for space by a variety of forest users such as horse riders, hikers, off-road vehicle riders, hunters, mushroom and berry pickers, and solitude seekers make it difficult to get away from other forest users."). Forest Service decisions regarding the mix of recreational opportunities that will be available in a particular unit may have important consequences for forest users, and those decisions may well be subject to judicial review in appropriate proceedings. It should be emphasized, however, that individuals who oppose timber harvesting may differ widely in their preferences regarding the desired range of alternative forest uses. As we explain below, respondents have not previously contended in this case that activities other than timber harvesting impair their enjoyment of the Wayne National Forest. Respondents' effort to expand their challenge to encompass an array of non-logging activities is an attempt to transform this into a fundamentally different lawsuit.

U.S.C. 1604(k); see 36 C.F.R. 219.14. The Wayne LRMP identified 126,107 out of 176,787 acres within the forest as suited for timber production. Plan 4-180; see note 3, *supra*. The Forest Service set the maximum allowable sale quantity (ASQ) at an average of 7.5 million board feet per year (*i.e.*, 75 million board feet total) during the first decade of the plan. Plan 4-10; Record of Decision (ROD) 18. For a variety of reasons, those determinations are not ripe for review in the context of a facial challenge to the plan.

1. The plan projections concerning the aggregate quantity of timber that would be harvested—whether expressed in terms of acreage on which timber may be offered for sale or in terms of board feet that may be offered—are not binding on the Forest Service; they are subject to change over the life of the plan. In rejecting the administrative appeal filed by respondent Citizens Council in this case, the Chief of the Forest Service emphasized that the "ASQ in the Forest Plan is the upper limit for timber outputs for the plan period, not actual proposals for timber sales offerings. The Forest Plan makes no promise or assurance that the outputs for any resource, including timber, will actually occur at the projected level." Pet. App. 100a. That authoritative interpretation of the Wayne LRMP is consistent with prior agency pronouncements, see, *e.g.*, 53 Fed. Reg. 26,832 (1988) (ASQ "is the maximum regulated volume of timber that can be sold over the planning period, not necessarily the volume that will be sold"), and is entitled to deference from a reviewing court. See also Pet. App. 33a (district court observes that "[t]he ASQ does not determine the actual amount of timber which will be sold but sets the upper limit for the plan period. The actual amount of timber sales may be less and will depend on several unpredictable factors").

2. The Wayne LRMP leaves the Forest Service substantial discretion to determine not only the aggregate quantity of timber that should be offered for sale, but also the locations within the forest in which harvesting will occur. Although the plan designated 126,107 acres within the forest as suited for timber production, it projected that only 7,835 acres would be harvested in the years 1986-1996, and that 11,138 acres would be harvested in the years 1996-2005. Plan 4-180. Thus, even under the projections contained in the Wayne LRMP, the large majority of suitable timber land would not actually be harvested during the life of the plan, since the Forest Service is required by the NFMA to develop a revised plan within 15 years after the LRMP's adoption in 1988. See 16 U.S.C. 1604(f)(5) (forest plans must be revised "at least every fifteen years," and the revision process must include a level of "public involvement comparable to that required" for the promulgation of a new plan).

Unless timber is actually harvested at a particular site, the mere designation of that tract as "suited for timber production" has no real-world, on-the-ground effect on the use and enjoyment of the land by respondents' members or others. As the district court observed, "[i]f the suitable timber base exceeds the amount required to meet the timber production goals of the Plan, that appears to be of little consequence except to give the Forest Service greater latitude in determining just where in the forest the timber harvests will occur." Pet. App. 37a. The resources of the courts and the Forest Service should not be expended on litigation concerning the suitability of lands the large majority of which would not have been harvested during the plan period in any event.

3. Finally, even if it were possible to determine from the Wayne LRMP precisely where the Forest Service intended to offer timber sales during the life of the plan, it would not make sense to litigate the question whether that land is "suited for timber production" in the context of a facial challenge to the LRMP itself. The factors bearing on the propriety of timber harvesting at a particular location may change, or new information may come to light, during the time between the adoption of the plan and the proposed sale. By requiring that judicial review occur in the context of a particular timber sale proposal, the courts can ensure that the propriety of the sale is assessed on the basis of current and complete information pertaining to the sale. That approach properly channels the energies of the agency and the courts into the concrete determination whether particular timber harvesting activities are actually appropriate, and away from the preliminary (and more abstract) determination whether various tracts are "suited" for harvesting.[5]

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[5] In affirming the Regional Forester's decision to adopt the Wayne LRMP, the Chief of the Forest Service observed that even where particular tracts have been designated as suited for timber production, the agency will conduct a site-specific analysis to determine whether harvesting should actually go forward. "For each proposed sale," the Chief explained, "a no action alternative, which has no timber harvesting, is also considered." Pet. App. 70a. The agency's decision to adopt a "no action" alternative at a particular site need not result in an amendment to the plan, or in a formal determination that the relevant parcel is "not suited for timber production." In that sense it may be accurate to say that the Forest Service's site-specific analysis will not involve a reassessment of the prior suitability determination. In determining whether a particular sale should go forward, however, the Forest Service remains free to reconsider, in light of any new evidence or changed

In the instant case, respondents alleged that the Wayne LRMP had arbitrarily designated as suitable for timber production lands that could be harvested only at a financial loss to the government. See J.A. 18. The ROD for the Wayne LRMP stated in general terms that "the overall timber sale program is expected to provide a positive cash revenue to the Forest," but acknowledged that the revenue realized by some sales contemplated by the plan would likely be less than "the cost to the U.S. in preparing and administering the sales." ROD 21. The Forest Service stated, however, that such "below cost" timber sales could provide a variety of nonmonetary public benefits. The agency explained, for example, that timber sales can "provide open area for vistas and a

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circumstances, the subsidiary factors that initially informed the plan-level suitability finding.

In any event, an agency decision is not rendered ripe for judicial review simply because some aspects of that decision will not be subject to agency reexamination in a subsequent proceeding. An agency adjudicator who applies a regulation to a particular set of facts is not authorized to reassess the question whether the regulation reflects a permissible or appropriate implementation of the governing statute. This Court has nevertheless held that, absent a contrary statutory directive (see Gov't Br. 20 n.14), "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA" until it has been applied to a concrete factual setting. *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). After the agency adjudicator applies the regulation (and any other relevant legal standards) to a concrete factual setting, the final decision in that adjudicatory proceeding will be subject to judicial review. At that point, the court can consider the validity of the regulation (if it ultimately played a decisive role in the agency adjudicator's decision), as well as any other legal issues that the plaintiff raised before the agency. See, *e.g.*, *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 57-61 (1993).

greater diversity in the landscape," and that "[a] variety of wildlife habitats are provided by a diversity of timber stand age classes and tree species." *Ibid.* The Forest Service concluded that "[i]f the visual, wildlife, and recreation benefits were added to the returns to the Treasury, timber sale benefits would substantially exceed the costs." *Ibid.* Respondents challenge that analysis, arguing that "the Forest Service arbitrarily placed a high value on wildlife and recreational opportunities that thrive as a result of logging without considering the costs of these activities to recreation and wildlife that depend on undisturbed forest." Resp. Br. 43.[6]

For the reasons stated at pages 14-19, *infra*, the Forest Service did not act in an arbitrary or capricious manner in assessing the likely advantages and disadvantages of below cost sales. The crucial point, however, is that in the context of an individual timber sale proposal, the agency can assess, on the basis of current, site-specific information, the anticipated monetary and nonmonetary costs and benefits of harvesting at a particular location. Judicial review (reflecting appropriate deference to the agency's resolution of disputed scientific and policy questions) will also be more focused and better informed: The question whether the Forest Service has rationally

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[6] Neither the Forest Service's discussion of below-cost timber sales nor respondents' complaint focuses on specific tracts of land. The LRMP and its supporting documents do not identify particular sites at which below cost sales are likely to be appropriate. Respondents' challenge to the plan's suitability determinations rests on a generalized attack on the agency's overall methodology; respondents have not identified sites that they believe to have been wrongly designated as suited for timber production. Compare ROD 21 with J.A. 19-21; Resp. Br. 43.

assessed the costs and benefits of a specific timber sale at a particular time and place is far more susceptible of intelligent judicial resolution than is any abstract inquiry into the general advantages and disadvantages of harvesting.

4. Respondents also assert that "[a]s with facial challenges to zoning ordinances, a challenge to the validity of a forest plan's entire multiple use determination is fit for review when the plan is adopted." Resp. Br. 20. This Court has made clear, however, that a facial challenge to a zoning ordinance is appropriate only insofar as it is alleged that the "mere enactment" of the ordinance inflicts a constitutionally impermissible injury upon the plaintiff. See *Suitum* v. *Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1666 (1997) ("the only issue justiciable" prior to the application of a zoning ordinance to a particular parcel is "whether mere enactment of the statute amounted to a taking"); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (facial challenge to zoning ordinance was proper where plaintiff alleged that "the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses"). Respondents do not and could not contend that the "mere enactment" of either the ASQ or the suitability determinations contained in the Wayne LRMP affected the ability of particular members to use and enjoy specific parts of the National Forest. Judicial review of the plan's programmatic guidance concerning timber harvesting activities is therefore appropriate only when that guidance is applied to particular sales. Compare *Suitum*, 117 S. Ct. at 1666 ("where the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his claim").

B. For the reasons stated above, the availability of administrative and judicial review of individual timber sale decisions fully protects respondents against the danger that their enjoyment of the Wayne National Forest will be impaired by arbitrary or unlawful timber harvesting. In contending that their plan-level challenge is justiciable, respondents rely heavily on the assertion that their ability to enjoy the forest (outside Management Area 6.2) will be "harmed by a variety of *non-logging* activities approved by the plan's land allocations, such as motorized recreation, herbicide use, grazing, utility pole corridors, road-building, and maintenance regimes, as well as by the plan's failure to direct more road closures to promote undisturbed backcountry recreation." Resp. Br. 31 (emphasis added); see also, *e.g.*, *id.* at 15 (outside Management Area 6.2, "the plan mandates no affirmative steps, like closing all non-essential roads, to promote wilderness recreation"). The thrust of that argument is that respondents' members are currently injured by those activities, independent of any harm they may suffer as a result of timber harvesting, and that the propriety of those activities cannot readily be determined in the context of a challenge to an individual timber sale.

Respondents' argument is not properly before this Court, since it was neither raised in nor addressed by the courts below. Respondents' complaint focused exclusively on the LRMP provisions concerning timber harvesting. Respondents alleged that their "[m]embers visit portions of the Forest which under the current management plan for the Forest have been or will be subject to clearcutting or other forms of logging of trees," J.A. 13, and they requested "a prelimi-

nary and permanent injunction prohibiting the defendants from permitting or directing further timber harvest and/or below-cost timber sales until the plan has been revised in accordance with law," J.A. 26. See also J.A. 19 (listing reasons that the Wayne LRMP is alleged to be arbitrary and capricious). Respondents did not contest in the lower courts the propriety of the "non-logging" activities they now identify in their brief in this Court, and neither of the courts below addressed those activities. The affidavits submitted by respondents to the district court on remand in August 1997 (see Gov't Br. 14, 42 n.31; Resp. Br. 13-14) likewise failed to identify any ongoing non-logging activities that they alleged were interfering with the ability of respondents' members to enjoy the Wayne National Forest.[7]

Respondents' catalogue (see Resp. Br. 31) of purportedly harmful non-logging activities, it should be noted, implicates two very different types of plan-level provisions. The LRMP's projections concerning possible *future* ground-disturbing activities (*e.g.*, "roadbuilding") are unripe for facial challenge for the same reason that the plan's timber harvesting provisions are unripe for immediate review. Rather, a person

[7] Respondents' complaint did allege that the timber harvesting contemplated by the Wayne LRMP would necessitate the construction of new roads, and that the road construction process would cause environmental damage. See J.A. 16, 17. That damage was treated in respondents' complaint as one of the deleterious consequences of timber harvesting; respondents did not challenge, or seek injunctive relief against, road construction as such. In any event, any facial challenge to the Wayne LRMP's road*building* provisions would have been unripe. See pp. 12-13, *infra*. Respondents' complaint contains no reference to the agency's purported failure to close existing roads. See p. 13, *infra*.

who would be injured by a particular roadbuilding project may file suit to challenge that project if and when it becomes imminent, after first exhausting available administrative remedies. See Gov't Br. 35. By contrast, a forest plan's "failure to direct more road closures to promote undisturbed backcountry recreation" (Resp. Br. 31) might well be subject to immediate judicial review, assuming that the plaintiff has satisfied exhaustion requirements and can demonstrate that his enjoyment of the forest is impaired by the agency's failure to close specified roads. The Forest Service's refusal to halt or curtail existing uses of public lands—unlike its projection that timber harvesting or similar site-specific activities will occur at some point in the future—may properly be characterized as a decision having an immediate on-the-ground effect.

However, neither respondents' complaint nor its briefs in the lower courts challenged the Forest Service's failure to include in the plan itself any provision for closing existing roads within the Wayne National Forest. Nor did respondents challenge the failure of the plan to bar any other existing uses of the forest that impaired the ability of identified members to use the land for competing recreational activities. Their challenge has instead been directed exclusively at the LRMP's projections concerning anticipated *future* timber harvesting activities. For the reasons stated above and in our opening brief, that challenge is not ripe for judicial review.

C. Respondents' claim of standing is flawed for substantially the same reasons. Insofar as respondents claim that their members suffer injury as a result of non-logging activities, their claim is not properly before this Court. Insofar as respondents' challenge is directed to the Wayne LRMP's timber

harvesting provisions, respondents have failed to demonstrate that the adoption of those provisions caused present or imminent injury to identified members. Because the plan did not commit the Forest Service to offer timber sales in any particular quantity or at any particular location (much less do so without offering an opportunity for a site-specific administrative and judicial challenge), it was unclear at the time of the plan's adoption whether any tracts utilized by particular members of the respondent organizations would ultimately be affected by timber harvesting activities.[8] And because each timber sale that does occur will be preceded by an individualized assessment of its likely costs and benefits, any injury that respondents' members may ultimately suffer as a result of those harvests would not be "fairly traceable," *Bennett* v. *Spear*, 117 S. Ct. 1154, 1161 (1997), to the plan itself. See Gov't Br. 22-24.[9]

II. Respondents contend that the Wayne LRMP is arbitrary and capricious because it designates an ex-

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[8] As respondents point out (see Resp. Br. 16; see also Gov't Br. 32 n.24), the Forest Service undertook a substantial number of timber harvesting projects in the years between its adoption of the Wayne LRMP and the filing of respondents' complaint. Respondents' failure to file suit to challenge any of those timber sales undermines any suggestion that any one of their members' use of and interest in the Wayne National Forest is so broad and encompassing that that member can be expected to suffer injury *whenever* timber is harvested within the forest.

[9] As we explain above (see p. 6, *supra*), the Wayne LRMP projected that only a small percentage of the suitable acreage would be harvested by the year 2005. With respect to any logging that may occur after that date, the causal link between the LRMP and a particular timber harvest will be broken not only by the agency's site-specific analysis of the individual sale, but by the statutorily required revision of the plan after 15 years.

cessive quantity of land as suitable for timber harvesting and fails to set aside sufficient acreage for "wilderness" recreation. They argue that the Wayne LRMP made timber harvesting "the dominant tool for implementing the plan," Resp. Br. 43, and that the agency "ignor[ed] public demand for wilderness and the prevalence of game species and hunting in the region," *id.* at 41. Those contentions are without merit.

A. As we explain above (see p. 6, *supra*), the Wayne LRMP projected that only 7,835 (out of 176,787 federally owned) acres would be harvested during the years 1986-1996, and that a total of 18,973 acres would be harvested during the years 1986-2005, by which time the Forest Service will have been required by NFMA to develop a revised plan. See also ROD 3 ("Trees will be harvested on about 1/2 percent of the Forest each year."). Those projections belie respondents' characterization of timber harvesting as "the dominant tool for implementing the plan." Resp. Br. 43. The Forest Service set the ASQ at an average of 7.5 million board feet per year for the first decade of the plan (see p. 5, *supra*), despite the agency's conclusion that "[u]nder current market conditions, the timber industry could use 18.4 [million board feet] of volume per year in the first decade." ROD 19. That decision further refutes any suggestion that other uses of the forest were subordinated to the goal of maximizing timber production.

B. Respondents also contend that the Forest Service "ignor[ed] public demand for wilderness" and "assume[d] that logging would provide unmitigated benefits." Resp. Br. 41, 45. Those assertions are entirely without basis. In adopting the Wayne LRMP, the agency explained that Management Area 6.2, which emphasizes "natural forest" conditions and opportunities for semiprimitive recreation, had been in-

creased from 11,187 acres in the proposed plan to 17,217 acres in the final plan in response to comments from the public. ROD 6, 11, 33, 34. All land within Management Area 6.2 was designated as "not suited for timber production" as a result of its allocation for "natural forest." ROD 20; Plan 4-176.

The Forest Service acknowledged that management of the Wayne National Forest in accordance with the 1988 LRMP would not satisfy the full public demand for semiprimitive recreational opportunities. See ROD 29 ("The Forest Plan meets 50 percent of the demand for [semiprimitive, nonmotorized] recreation in the first decade."). The agency explained, however, that its "capability to fulfill the public's recreation expectations [wa]s limited by a number of factors." Plan 3-2. It observed that "[t]he Forest's scattered land ownership pattern and the difficulty in closing the high density of public roads limit the possibilities for recreation environments which are largely unaffected by human activities." *Ibid.* The Forest Service also noted that competing recreational demands "make it difficult to get away from other forest users." *Ibid*; see also ROD 29 (stating that dedication of land to semiprimitive, nonmotorized recreation lowers cost efficiency "because fewer people will visit the area once the roads are closed"); note 4, *supra*.

Contrary to respondents' apparent contention, the Forest Service did not act in an arbitrary or capricious manner by failing to satisfy the entire demand for a specific use of public lands. The Forest Service did not "ignore" the public desire for semiprimitive recreation; it simply struck the balance between that form of recreation and competing uses of the Wayne National Forest as a whole in a different manner than respondents would prefer. The Forest Service's designation of suitable timber lands reflected a rational balancing of competing objectives and was well within the agency's broad discretion under the NFMA and forest planning regulations. Compare, *e.g.*, *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 697 (1991) (where determination of relevant decisionmaking criteria "necessarily require[s] significant expertise and entail[s] the exercise of judgment grounded in policy concerns[,] * * * courts appropriately defer to the agency entrusted by Congress to make such policy determinations"); *INS* v. *Wang*, 450 U.S. 139, 144-145 (1981).[10]

C. As we explain above (see pp. 8-9, *supra*), the Forest Service in adopting the Wayne LRMP anticipated that below-cost timber sales would sometimes be advisable, in part because "[a] variety of wildlife habitats are provided by a diversity of timber stand age classes and tree species." ROD 21; see also FEIS 2-16 ("Wildlife biologists agree that Forest openings created by clearcutting significantly increase the vegetative diversity of the Forest and its ability to

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[10] Respondents assert that "[a]s a result of over-emphasizing logging and under-emphasizing wilderness recreation, only 10% of the forest is designated for undisturbed wilderness recreation. Conversely, five of the largest management areas, covering over 75% of the forest, are designated for off-road vehicle use and/or even-aged logging." Resp. Br. 46. Respondents' statistical comparison rests on the premise that entire management areas were "designated" for timber harvesting, even though the LRMP projected that logging would occur during the plan period on only a small percentage of the land within each management area. In fact, the acreage (17,217) contained within Management Area 6.2 closely approximates the acreage (18,973) projected to be harvested throughout the forest during the years 1986-2005. Plan 4-176, 4-180.

support a wide range of wildlife species.").[11] The agency observed that "[a]s 'recreationists', hunters benefit from increases in game populations due to habitat improvements obtained through timber harvest by the clearcutting method." FEIS 2-16. Respondents contend that the Forest Service "ignored the extent to which existing conditions already satisfy demand for various types of nonwilderness recreation." Resp. Br. 45.

Contrary to respondents' assertion, the Forest Service considered the existing uses of surrounding lands in identifying the areas within the Wayne National Forest that would potentially be subject to timber harvesting. See Pet. App. 45a (district court states that although the Forest Service "is not required to compensate for [surrounding areas] in the Forest Plan * * *, the forest planners did consider the area surrounding the Wayne"). The agency's decision to increase the size of Management Area 6.2 (as

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[11] The Forest Service further explained:

> Areas harvested by clearcutting regenerate rapidly and within 8 to 10 years are filled with regeneration 20 to 30 feet tall. By the time they are 20 years old, most people do not realize that they were even clearcut. At any time, the amount of the Forest with an "open canopy" from clearcutting will be less than 10 percent even in Management Areas 3.1 and 3.2. The open area greatly increases the capacity of the Forest to support some species of wildlife.

FEIS 2-23 (quoted at Pet. App. 23a) (district court opinion). Thus, the thrust of the agency's analysis was not that timber harvesting should be used as a "means to convert mature forest into pasture." Resp. Br. 43. Rather, the agency concluded that the diversity of wildlife within the Wayne National Forest could be substantially enhanced by the creation of temporary clearings that would comprise (at any given time) a small percentage of the forest as a whole.

compared to the proposed plan) was made partly in response to comments noting the relative dearth of "natural forest," and the relative abundance of early successional habitat, in the areas surrounding the National Forest. See FEIS 2-24 to 2-29.[12] For essentially the same reasons, the Forest Service determined that no new wildlife developments (such as openings and impoundments) should be constructed, and existing developments should be removed, within Management Area 6.2. See ROD 16 (deciding not to utilize wildlife developments in Management Area 6.2, based on the view of many commenters that "the existing, abundant, open, agricultural, and young timber forests on State and private lands provided adequate early-successional habitat"); FEIS 2-28, 2-40. Although respondents would have preferred that the Forest Service place even greater emphasis on the preservation of "natural forest" conditions, the record does not support their contention that the agency acted in an arbitrary or capricious manner or ignored conditions on surrounding lands.[13]

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[12] By contrast, "[o]ther commenters wanted more early-successional habitat in order to increase or maintain populations of some species, such as ruffed grouse." ROD 15. Thus, the agency did not ignore a unanimous public sentiment favoring preservation of "natural forest" conditions; rather, it balanced competing objectives and public preferences in a manner well within its broad sphere of discretion.

[13] On February 11, 1998, the Forest Service issued a non-significant amendment to the Wayne LRMP. We have lodged a copy of that amendment with the Clerk of this Court. The amendment contains two tables. The first gives statistics (listed in annual averages) regarding the aggregate volumes of hardwood, pine, and total timber actually sold in the Wayne National Forest during the period 1988-1997 and the aggregate volumes projected to be sold during the period 1998-2002. The second provides statistics concerning the methods of harvesting

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss on the ground that respondents' suit is unripe and therefore nonjusticiable. In the alternative, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FEBRUARY 1998

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employed in the Wayne National Forest during the years 1988-1997. The Decision Notice explains that the purpose of the amendment is to eliminate possible public confusion concerning the agency's actual management practices in the Wayne National Forest. See Decision Notice at 1, 3, 5.

The plan amendment does not affect the issues before this Court or render this case moot. The amendment does not alter the ASQ, the designation of land suitable for timber harvesting, the management area designations, or the standards and guidelines contained in the Wayne LRMP. Decision Notice at 2, 4. Although the amendment does make clear that the type and volume of timber harvesting activities in the Wayne National Forest have been substantially different from those initially projected in the plan, that fact had previously been made clear in Forest Service documents and was known to the Court at the time it granted the petition for a writ of certiorari. See Gov't Br. in Opp. 16-17. The Supervisor for the Wayne National Forest, in August of last year, had announced his intention to adopt a non-significant plan amendment to bring plan projections into conformity with actual experience since 1988. See Letter from José A. Zambrana (Aug. 29, 1997) (quoted in Gov't Br. in Opp. 21).

(5)

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In the

Supreme Court of the United States

October Term, 1997

OHIO FORESTRY ASSOCIATION,
Petitioner,

v.

SIERRA CLUB,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE OHIO FORESTRY ASSOCIATION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether respondents' challenge to the Wayne National Forest Land and Resource Management Plan developed by the United States Forest Service in accordance with the National Forest Management Act of 1976 presents a justiciable controversy.

2. Whether the Forest Service is, by virtue of the statutes under which it operates, institutionally biased in favor of timber production in a judicially remediable way.

3. Whether the statutes providing for multiple use of the national forests grant a preference to primitive recreation or restrict even-aged management to "exceptional circumstances."

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF)[1] is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. Over 25,000 individuals, organizations, and associations support PLF's efforts nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases concerning the authority of administrative agencies to exercise the discretion delegated to them under Acts of Congress. For example, PLF participated as amicus curiae before the United States Supreme Court in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Amicus seeks to augment the argument in the petitioner's brief by elucidating the purposes for which our National Forests were created and the aims and goals of federal legislation governing National Forest lands and United States Forest Service policy. PLF believes that its public policy perspective and litigation experience dealing with federal land regulation will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Supreme

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Court Rule 37, written permission from all parties for PLF to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

Under the National Forest Management Act, 16 U.S.C. § 1600, *et seq.*, the United States Forest Service is obligated to create a Land and Resource Management Plan (Plan) periodically for each National Forest. 16 U.S.C. § 1604. A Land and Resource Management Plan does not dictate the activities that will occur on a particular forest; however, it does serve as a blueprint for the activities which are permissible on a given forest for periods of up to 15 years. 16 U.S.C. § 1604(f)(5).

In 1988, the Regional Forester for the Eastern Division of the United States Forest Service issued, after seven years of planning, a final 10-year Plan for the Wayne National Forest in Ohio. *Sierra Club v. Thomas*, 105 F.3d 248, 249 (6th Cir. 1997); *Sierra Club v. Robertson*, 845 F. Supp. 485, 489 (S.D. Ohio 1994), *rev'd Sierra Club v. Thomas*, 105 F.3d 248. Under the Wayne Plan, the Forest Service designated 126,107 acres, or roughly 71% of the 177,701 acres of federal land within the gross area of the forest, as suitable for timber harvesting. *Thomas*, 105 F.3d at 249, *Robertson*, 845 F. Supp. at 489. The Plan allows up to 7.5 million board feet of timber to be harvested per year. *Thomas*, 105 F.3d at 249. The Plan also specifies that 80% of the harvesting may be done by means of "even-aged" management or clearcutting. *Robertson*, 845 F. Supp. at 490. The remaining 20% may be harvested under "uneven-aged" management methods. *Id.*

The Sierra Club challenged the Wayne Plan, alleging the Forest Service had violated both the National Forest Management Act, the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528, *et seq.* and the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* *Robertson*, 845 F. Supp. at 487.

The District Court rejected each of the Sierra Club's challenges, finding that the record adequately supported the findings and decisions of the United States Forest Service in adopting the Plan. *Id.* at 503. On appeal, the Sixth Circuit reversed. *Thomas*, 105 F.3d at 249. The Sixth Circuit determined: (1) the Sierra Club had standing to bring this challenge; (2) the Forest Service's decision to allow significant timber harvesting under the Wayne Plan amounted to an unlawful institutional "bias" in favor of timber harvesting; and (3) the Forest Service abused its discretion, because the National Forest Management Act allows even-aged management only under "exceptional circumstances."

The validity of the Sixth Circuit's opinion on each of these questions was presented to this Court for review. Believing the first issue will be adequately addressed by the parties to this case, amicus Pacific Legal Foundation will address only the latter two.

SUMMARY OF ARGUMENT

The opinion of the Sixth Circuit demonstrates a marked ignorance of and disregard for the congressional policies behind creating, funding, and maintaining our National Forest System. Our national forests were not created to preserve trees. Rather, they were created for multiple productive uses, including the growth and harvesting of timber.

The history behind federal enactments dealing with the National Forest System and the United States Forest Service as well as the federal enactments themselves demonstrate a distinct and prominent interest in promoting the use of national forests for the provision of raw timber to benefit United States citizens. Consequently, any "bias" of the Forest Service in favor of timber production is entirely reflective of Congress' express intent in managing the National Forest System.

The National Forest Management Act was enacted specifically to restore the practice of clearcutting as one of the tools available to the Forest Service for managing National Forest lands. The Sixth Circuit's reading that the National Forest Management Act was intended to prohibit or severely limit its uses to "exceptional circumstances" turns this legislation on its head.

The Forest Service's mandate is to manage the National Forests for multiple uses. Our national forests provide us with places to hunt, ski, hike, mountain climb, camp, fish, and carry out many other recreational activities. But Congress also intended our forests to serve another purpose: sustained yield--to provide citizens with resources needed to build affordable homes and furnishings, and to produce paper and other wood products. The court below unjustifiably enforced its own preference for wilderness and recreation over the greater and more varied interests of the American people as expressed through their representative government. For these reasons, this Court should reverse the decision of the court below.

ARGUMENT

I

THE FOREST SERVICE'S PROMOTION OF TIMBER HARVESTING ON NATIONAL FOREST LAND IS NECESSARY TO MEET ITS STATUTORY OBLIGATIONS

> The forests must be, and will be, not only preserved but used, and the experience of all civilized countries that have faced and solved the question shows that the forests, like perennial fountains, may be made to yield a sure harvest of timber while at the same time all their far-reaching beneficent uses may be maintained unimpaired.
>
> *John Muir, founder of the Sierra Club, in 1895.*

Historically, it has been acknowledged that a forest can serve many competing needs. The serenity and beauty of a forest can provide respite from the frantic pace and stress so common in modern urban life. But a forest can also play a part in creating the facilities for modern urban living: wood for housing and other buildings, furnishings, and paper products. In setting up the National Forest System, Congress favored an approach founded upon the idea suggested by John Muir. Congress designated some of this Nation's forests as National Forests to provide a sustained yield of timber, but directed that they be managed so that Americans could enjoy the many other benefits forests provide. This case deals with whether the United States Forests Service met its management obligations in creating a Plan for the management of the Wayne National Forest.

The Sixth Circuit concluded that the Wayne Plan was arbitrary and capricious, and therefore contrary to law, because the Forest Service has an institutional bias in favor of timber harvesting. The court summarized the Forest Service's handicaps thus:

> Created, in part, to ensure a reliable timber supply, the Forest Service has a history of preferring timber production to other uses. Rather than being a neutral process which determines how the national forests can best meet the needs of the American people, forest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse.

Thomas, 105 F.3d at 251. The court further explained that legislatively created financial incentives related to timber harvests skewed the Forest Service's decisions, demonstrating an unlawful "bias" in favor of timber harvesting over other forest uses. *Id.*

The problems with the Sixth Circuit's conclusions are almost too fundamental to adequately critique. Under the lower court's simplistic rule, the mere continued existence of the Forest Service under current law creates a bias that may be invoked to invalidate every Plan for every forest in the United States (or, for that matter, any other Forest Service rule, regulation, or enactment). Indeed, in the Sixth Circuit's view, the only possible "unbiased" plan may be one that allows no timber harvesting at all. The court's summary conclusion that this "bias" renders the Forest Service incapable of determining how to "best meet the needs of the American people" begs the question: who, then, is capable of making (and has the authority to make) this neutral determination? Apparently, in the Sixth Circuit, the answer is the Sixth Circuit Court of Appeals itself.

The Forest Service, like any organization, and certainly like every bureaucracy, is not immune from error. However, the error assigned to it by the Sixth Circuit, that the Forest Service has an unlawful "bias" in favor of timber harvesting, is absurd for the simple reason that the promotion of timber harvesting on national forest land is part of its congressional mandate. The "bias," if any exists, must be assigned to Congress, and any disagreement with Congress on what is in the best interests of the American people should be debated in the House of Representatives and Senate, not the courtroom.

A. Under the Organic Administration Act of 1897, the National Forests Were Created for the Express Purpose of Providing a Supply of Natural Resources for the Use of the American People

To put this case in context, it is useful to understand the history of our national forests--what interests prompted their creation, and what interests prevailed in the Congressional Acts that govern their management. The view adopted by the court below, and embraced by late Twentieth Century environmental activists--that the best use of our National Forests is to preserve

trees for the sake of the trees themselves--is a view which, rightly or wrongly, has never commanded a majority of our legislature.

As elaborated upon by this Court in *United States v. New Mexico*, 438 U.S. 696 (1978), the National Forest System had its genesis with the Act of March 3, 1891 (the Creative Act). James L. Huffman, *A History of Forest Policy in the United States*, 8 Env. L. 239, 258 (1977). Section 24 of that Act (sometimes referred to as the Forest Reserve Act) delegated to the President of the United States the power to reserve portions of the public land bearing forests. *Id.* at 258-59 (citation omitted). Under this Act, the President could simply create a forest reserve by proclamation and establish the limits of that reservation. *Id.*

Pursuant to this Act, President Harrison established 15 reserves covering 13 million acres before he left office in 1893. *Id.* at 360 (citation omitted). Soon thereafter, succeeding President Grover Cleveland established two additional reserves, adding another 4.5 million acres to our national forest reserves. *Id.* (citation omitted). However, these actions were not taken without controversy. As pointed out by Gifford Pinchot, one of the leading foresters and conservationists of the era (and one of the early chief foresters of the Forestry Division within the Department of the Interior), *id.* at 251-53, one of the problems created by the Forest Reserve Act is that it did not provide for use or management of these forest reserves--only their creation. *Id.* at 259-60 (citation omitted).

This problem noted by Pinchot--the tension between preservation interests versus those who prefer to use forest preserves--came to a head in 1897. Ten days before leaving office, Grover Cleveland designated an additional 21 million acres of federal land as forest reserves. *Id.* at 262 (citation omitted). This alarmed members of Congress, who believed these lands would thus be "locked up" rather than used. *Id.* (citation omitted). The irony was that Cleveland had no such

intention. His administration had created the National Forest Commission (Commission), whose assigned role was to create a plan for forest management and use. *Id.* at 261 (citation omitted). However, the Commission had not completed its plan by the time Cleveland left office. *Id.* at 263 (citation omitted). Shortly after McKinley took office, the Commission issued a report. The report concluded:

> These great bodies of reserved lands cannot be withdrawn from all occupation and use. They must be made to perform their part in the economy of the Nation. Unless the reserved lands of the public domain are made to contribute to the welfare and prosperity of the country, they should be thrown open to settlement and the whole system of reserved forest abandoned.

Id. at 263 (citation omitted).

Despite the Commission's full support of the use of forest reserves, Congress felt compelled to act on its own in order to forestall the possibility that future Presidents would disfavor the use of public forests. Senator Pettigrew of South Dakota introduced a bill for the management of the public forest reserves. *Id.* (citation omitted). The Pettigrew Amendment to the Appropriations bill was passed on June 4, 1897. *Id.* at 264 (citation omitted). The language of the Pettigrew Amendment, with minor modifications, is still codified at 16 U.S.C. § 475 as the Organic Administration Act:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . .

16 U.S.C. § 475. Thus was the National Forest System created for the use and management of timber resources.

B. The United States Forest Service's Focus upon Timber Production Is in Accordance with Legislative Purposes

For the first half of this century, the Organic Administration Act governed the management of the National Forests, and that Act remains viable today. One of the more telling events in the history of our national forests was that the job of managing our national forests was transferred from the Department of the Interior to the Department of Agriculture. The effort to move the management of national forests from Interior over to Agriculture culminated in 1905 with the Act of February 1, 1905. Huffman, 8 Env. L. at 267 (citation omitted). At that time, Overton Price of the Forestry Division explained the logic of the move:

> Forestry is a component post of agriculture. Every source of wealth grown from the soil is in the sphere of the Department of Agriculture; hence the forest work rightly belongs to it. The production of timber is as naturally within the scope of the Department of Agriculture as is the production of field crops.

Id. at 266-67 (citation omitted). By June of 1905, the United States government had designated over 85 million acres as forest reserve lands. *Id.* at 268 (citation omitted). By the time President Theodore Roosevelt left office in 1909, there were over 159 national forests totaling over 150 million acres. *Id.* at 269-70 (citation omitted).

Although there was much debate and controversy surrounding the Forest Service's management of the National Forests throughout the early part of this century, no legislation was enacted which altered either the Forest Service's authority over the national forests, or the basic mandate of the Organic Administration Act. Throughout this period, this Court faithfully adhered to the principle that the Court had no power

to usurp or undermine congressional authority to "make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. In deciding *Light v. United States*, 220 U.S. 523 (1911), this Court held:

> The United States can prohibit absolutely or fix the terms on which its property may be used.
>
> "All the public lands of the nation are held in trust for the people of the whole country." *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160. [] And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, *nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes.*

Light, 220 U.S. at 536-37 (emphasis added). Despite the dissatisfaction of those who would have preferred preservation to use of forest resources, Congress did not feel compelled to change the law with regard to either the purposes of National Forest System lands or the jurisdiction of the Forest Service. And courts appropriately refused to engage in value judgments about Congress' wisdom in managing National Forests for timber production.

C. The Multiple Use Sustained Yield Act of 1960 Expanded the Purposes for Which the National Forests Were to be Managed, but Did Not Undermine or Displace the Purposes Established by the Organic Administration Act of 1897

Although there was much debate within political and public circles that national forests were being managed in too

utilitarian a manner, it was not until 1960 that Congress reassessed its determination of what best served the interests of the American people in the management of our National Forests. That year, Congress passed the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528, *et seq.* The Multiple-Use Sustained-Yield Act proclaimed:

> It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.

16 U.S.C. § 528. While Congress expanded the uses for which the forests should be managed, it emphasized that the purposes behind creating our National Forest System--protection of watershed and production of timber--remained paramount. To the statement above, it added the qualification:

> The purposes [of this Act] are declared to be *supplemental to, but not in derogation of,* the purposes for which the national forests were established . . . .

16 U.S.C. § 528 (emphasis added).

Though still valid, the Multiple-Use Sustained-Yield Act has not been a particularly satisfactory piece of legislation for those who favor forest preservation over use, largely because the Multiple-Use Sustained-Yield Act does not impose any substantive requirements upon the Forest Service. *See Sierra Club v. Morton*, 405 U.S. 727, 728 n.7 (1972) (Douglas, J. dissenting). The Multiple-Use Sustained-Yield Act requires that the Secretary of Agriculture give "due consideration" to the "relative values" of the various multiple uses in the administration of the National Forests. 16 U.S.C. § 529. As pointed out in *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alaska 1971), *rev'd sub nom., Sierra Club v. Butz*, 542 F.2d 1180 (9th Cir. 1976), although the Forest Service was obligated to consider multiple uses under the Multiple-Use Sustained-

Yield Act, Congress had not indicated the "weight to be assigned each value." *Id.* at 123. Consequently that court declined to disturb the Forest Service's judgment in the administration of forest policy.

Despite any perceived shortcomings, however, the Multiple-Use Sustained-Yield Act and the Organic Administration Act remain the law regarding the purposes for which our National Forests exist. While the National Forest Management Act, the National Environmental Policy Act, and other legislation have imposed procedural requirements upon the Forest Service, Congress has never disturbed the basic precept that the primary management purposes for our National Forests are the production of timber and the protection of watershed resources. Indeed, this Court pointed out that, even under the Multiple-Use Sustained-Yield Act, *a national forest could not be established unless* it served one of these purposes, because the multiple-use purposes were secondary to the purposes enunciated in the Organic Administration Act. *New Mexico*, 438 U.S. at 715.

It is important to note, however, that the primacy of resource use in the management of our National Forests has not been at the expense of conservation. On the contrary, Congress has attended assiduously to the interests of conservationists in preserving places of natural beauty, value, interest, and importance. For example, in 1916, Congress passed the National Park System Act, 16 U.S.C. § 1, *et seq.*, and in 1964 Congress passed the Wilderness Act. 16 U.S.C. § 1131, *et seq.* In addition, Congress has created numerous National Recreation Areas and National Conservation areas by federal enactment, *see, e.g.*, 16 U.S.C. § 90a, 16 U.S.C. § 460y, and Presidents since 1906 have used the Antiquities Act, 16 U.S.C. § 431, *et seq.*, to create national monuments. President Carter used the Antiquities Act to designate 56 million acres of land in Alaska for 17 national monuments. George Cameron Coggins and Robert L. Glicksman, *Public Natural Resources*

Law, Vol. I, § 2.03[2][a]at 2-11 (Clark Boardman Callaghan 1997), and just last year, President Clinton used the Antiquities Act to designate 1.6 million acres of land in Utah as the Grand Staircase-Escalante National Monument. 61 Fed. Reg. 50,223. As of 1994, the National Park System had set aside over 80 million acres of federal land spread over 49 states. *United States Department of Interior National Park Service Master Deed Listing as of December 31, 1994*. In addition, although National Forest Lands cover 191 million acres of federal land, Coggins and Glicksman, § 2.03[2][b] at 2-14, over 44 million acres of National Forest land have been set aside for wilderness areas, wild and scenic river areas, game refuges and other preserves. *Land Areas of the National Forest System as of September 30, 1994*, USFS FS-383. In addition, 91 million acres under the control of the United States Fish and Wildlife Service have been set aside for fish and wildlife protection, *Annual Report of Lands Under Control of the USFWS as of September 30, 1994*, and the Bureau of Land Management presides over even more federal land set aside as wilderness, outstanding natural areas, national natural landmarks, and other areas of environmental value. *See generally*, 43 U.S.C. § 1782, Coggins and Glicksman, § 2.04[2] at 2-20-1.

The perception urged upon American citizens by environmental activists and accepted without question by the court below is that the public forest lands of the United States are being denuded in favor of timber industry interests. Ignoring for the moment that the timber industry serves the desires and demands of large portions of the American populace, this perception about public lands is plainly wrong and distorted. Besides the fact that tremendous portions of federal land, including large portions of forested lands, have been set aside for the purpose of preservation, timber growth is more than keeping pace with timber consumption. In 1991, annual timber growth outstripped timber harvest on United States timberland by over 5 billion board feet. Douglas S. Powell, Joanna L. Faulkner, David R. Darr, Zhiliang Zhu,

Douglas MacCleery, *Forest Resources of the United States, 1992*, USDA Forest Service General Technical Report RM-234. In fact, the amount of timber harvested in this country has consistently been lower than the amount grown since the 1950's. *USDA, Forest Service: An Analysis of the Timber Situation in the United States, 1952-2030; Forest Resources of the United States* (1992).

The United States Congress created a system of public lands that categorizes land by purpose and jurisdiction. To preservationists like the respondents in this case, it is not enough that Congress has set aside national wilderness areas, national parks, wild and scenic rivers, national monuments and other federal land reserves. Now it appears that the competing interests of Americans in using natural resources to improve the quality of their lives must also give way to preservationist goals. This is not and never has been the means by which Congress chose to meet the needs of the American people. The Forest Service manages our National Forests with the goal of promoting the purposes for which Congress created them: timber production and watershed protection. This Court should affirm that timber production is not merely an allowable goal of the Forest Service in managing forest lands, but one of the central and governing principles by which it is obligated to operate.

II

THE FOREST SERVICE'S DECISION TO ALLOW CLEARCUTTING IS CONSISTENT WITH THE TERMS OF THE NATIONAL FOREST MANAGEMENT ACT AND ITS IMPLEMENTING REGULATIONS

A. The History Behind the National Forest Management Act Demonstrates That Congress Accepted the Use of Even-Aged Management as a Forest Management Tool

The Sixth Circuit rejected the Wayne Plan largely because the Forest Service projected that even-aged management

techniques, or clearcutting would be utilized on 80% of the land designated for timber harvest. As correctly noted by the Court, the National Forest Management Act allows even-aged management only when "*consistent with* the protection of soil, watershed, fish, wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource." 16 U.S.C. § 1604(g)(3)(F)(v) (emphasis added). Based on this language, the Court drew the astounding conclusion, "The National Forest Management Act *thus contemplates that even-aged management techniques will be used only in exceptional circumstances*." *Thomas*, 105 F.3d at 251 (emphasis added). In short, the Sixth Circuit made an unsubstantiated presumption that even-aged management is rarely consistent with preserving environmental values and timber resources. It transformed an essentially fact-based determination--whether the Forest Service's decision satisfied the terms outlined in the National Forest Management Act--into a value judgment--what set of facts would satisfy a court's conception of "exceptional circumstances."

Part of the Sixth Circuit's error derived from its misconception of the purposes behind the National Forest Management Act. The Court noted:

> The National Forest Management Act was enacted as a direct result of congressional concern for Forest Service clearcutting practices and the dominant role timber production has historically played in Forest Service policies. Congress was concerned that, if left to its own essentially unbridled devices, the Forest Service would manage the national forests as mere monocultural "tree farms." . . . Substantively, the Act imposes extensive limitations on timber harvesting by restricting the use of clearcutting to situations where clearcutting is the optimum method for harvesting.

Thomas, 105 F.3d at 258-59. The court's analysis is flawed. Although the enactment of the National Forest Management

Act was indeed prompted by Congress' concerns about clearcutting, *the concern was that clearcutting had been improperly banned through court order*.

The immediate impetus behind the National Forest Management Act was a case called *West Virginia Division of the Izaak Walton League of America, Inc. v. Butz*, 367 F. Supp. 422 (N.D. W. Va. 1973), *aff'd*, 522 F.2d 945 (4th Cir. 1975) (the *Monongahela* decision). John F. Hall and Richard S. Wasserstrom, *The National Forest Management Act of 1976. Out of the Courts and Back to the Forests*, 8 Env. L. 523, 523 (1977). In *Monongahela*, an environmental group sued the Secretary of Agriculture, challenging the validity of certain timber sale contracts for timber within the Monongahela National Forest. *Monongahela*, 367 F. Supp. at 424. Specifically, the plaintiffs (one of whom was the Sierra Club, plaintiff here) alleged that the contracts violated the terms of the Organic Administration Act. *Id.* Section 476 of that Act stated:

> For the purpose of preserving the living and growing timber and promoting the younger growth on national forests, the Secretary of Agriculture . . . may cause to be designated . . . so much of the dead, matured, or large growth of trees found upon such national forests as may be compatible with the utilization of the forests thereon and may sell the same.

Monongahela, 367 F. Supp. at 424 n.1. It also provided:

> Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of Agriculture . . . .

Id. The timber sale contracts in question, not unlike many of the contracts entered into by the Forest Service, allowed timber harvesters to clearcut entire stands, regardless of whether all of the trees within a particular stand were "dead, matured, or

large." *Id.* at 427. The Forest Service also "marked and designated" trees by sectioning off entire areas, rather than marking each individual tree. *Id.* at 428. These practices were understood by the Forest Service to be consistent with the Organic Administration Act. *Id.* at 427. However, the District Court disagreed. The court held that the language of Section 476 meant

> that trees can be sold and cut only if they are "dead, matured or large growth" and then may be sold only when the sale serves the purpose of preserving and promoting the younger growth of timber on the national forests.

Id. at 429. In essence, the *Monongahela* decision, later affirmed by the Fourth Circuit (which invited Congress to revise the Organic Administration Act, *Monongahela*, 522 F.2d at 955), and followed by other courts (*see for example*, *Zieske v. Butz*, 406 F. Supp. 258 (D. Alaska 1975) (invalidating a 50-year old timber sale which had been consummated 24 years previously)), managed to severely curtail the authority of the Forest Service to conduct timber sales.

The response from Congress was swift. Several bills were introduced to counteract the effect of *Monongahela* and its progeny. Hall and Wasserstrom, 8 Env. L. at 524 (citation omitted). Representative Tom Foley, then-chairman of the House Agriculture Committee, bemoaned the situation created by these court decisions, claiming "if Congress does not act very soon, there will shortly be a nationwide sawtimber shortage of crisis proportions." *Id.* (citation omitted). While it is true that preservationist interests were discussed and debated within the Congress, including severe curtailment of clearcutting, the resulting bill, authored by Senator Hubert H. Humphrey, clearly favored a continued policy of promoting timber production, with provisions for employing clearcutting and other even-aged management techniques. Stephanie M. Parent, *The National Forest Management Act: Out of the*

Forest Management Act: Out of the Woods and Back to the Courts? 22 Env. L. 699, 709 (1992) (citation omitted).

The National Forest Management Act repealed that section of the Organic Administration Act which was the basis for the *Monongahela* decision. Pub. L. No. 94-588, § 13, and grandfathered in all previous timber sale contracts entered into by the Forest Service in which the Forest Service had utilized its existing "silvicultural practices and sales procedures." Pub. L. No. 94-588, § 15. Senator Humphrey, in introducing the bill which eventually became the National Forest Management Act, pronounced: "In short, this bill is designed to get the practice of forestry out of the courts and back to the forests." Hall and Wasserstrom, 8 Env. L. at 523 (citation omitted). While it is true that the National Forest Management Act imposed procedural requirements upon the Forest Service, contrary to the implication of the Sixth Circuit's opinion, the National Forest Management Act restored the authority of the Forest Service to manage national forests for the purpose of timber production and to utilize even-aged management techniques in promoting their health and productivity.

B. The Sixth Circuit's Creation of the "Exceptional Circumstances" Test Is Unjustified, Since the National Forest Management Act Clearly Contemplates the Use of Even-Aged Management

Senator Humphrey's remark that the National Forest Management Act was intended to remove the judiciary from engaging in forest management has taken on a certain irony in this case. The Sixth Circuit's interpretation of the National Forest Management Act is an echo of the situation which prompted adoption of the Act in the first place: judicial interference in forestry practices. While the National Forest Management Act did not resolve all potential conflicts between preservationists and foresters, it answered precisely one of the questions addressed in this case: the propriety of using even-aged management techniques such as clearcutting.

Section 1604 delineates the criteria under which even-aged management may be used as a cutting system on National Forest System lands. In addition to meeting procedural requirements for how even-aged management practices should be implemented, the National Forest Management Act provides that clearcutting should be allowed where it is the "optimum" method of harvesting, and where use of even-aged management is consistent with protecting environmental resources and generating timber. 16 U.S.C. § 1604(g)(3)(F).

In this case, the District Court analyzed each of the factors outlined in Section 1604, as well as the Forest Service regulations implementing that statute, and reviewed the administrative record to insure that the Forest Service met its statutory obligations in developing the Wayne Plan. Part of the administrative record revealed why the Forest Service concluded that clearcutting would be suitable in the Wayne National Forest:

> In summary, where oak-hickory reproduction is not a problem, clearcutting is optimum. It offers more flexibility of location to manage timber for other purposes, higher revenues, lower costs, and less risk. In nearly all cases, clearcutting will regenerate as much, or more, oak than uneven-aged management by the group-selection method and more than would be regenerated using [a] single-tree selection method of management.

Robertson, 845 F. Supp. at 493. In sum, the record revealed that the Forest Service based its decision in accordance with the standards delineated in the National Forest Management Act. Nonetheless, the Sixth Circuit concluded that the Forest Service had exercised flawed judgment.

Rather than follow the statutory requirements for when clearcutting is allowed, the Sixth Circuit substituted its own test, stating that clearcutting was only permissible under

"exceptional circumstances." Though harvesting by clearcutting can leave plots of forest land in a temporarily unattractive state, this has no bearing upon the question of whether clearcutting is the "optimum" method of forest management, or is consistent with the preservation of forest resources. By viewing clearcutting as inherently "bad," despite the fact that nature itself "clearcuts" by fire, disease, or windstorms, the Sixth Circuit simply substituted its own uninformed judgment upon the utility of clearcutting in the practice of forestry for the experience and expertise of the Forest Service.

This second-guessing by the Sixth Circuit was precisely the type of judicial interference Congress sought to curtail in enacting the National Forest Management Act. Though attempts were made in the legislature to limit the Forest Service's ability to employ even-aged management techniques, such efforts were soundly rejected. Hall and Wasserstrom, 8 Env. L. 531 n.41 (citation omitted). In stark contrast, Congress adopted virtually wholesale the "Church Guidelines"--guidelines that dictated when even-aged management was appropriate--in Section 1604(g)(3)(E) and (F) of the National Forest Management Act. *Id.* at 532; Parent, 22 Env. L. at 712-15. Given that the Church Guidelines had been adopted by the Forest Service in 1972, it is difficult to imagine a more explicit statement from Congress that it endorsed the existing even-aged management practices already employed by the Forest Service at that time. Hall and Wasserstrom, 8 Env. L. at 531.

Because the *Monongahela* decision banning clearcutting was the impetus behind the National Forest Management Act, the issue of clearcutting and other even-aged management techniques was exhaustively discussed by Congress--and rigorously defended by the forestry professionals who testified before Congress that it was a necessary and useful management tool if exercised in an environmentally responsible way. *See generally*, Hall and Wasserstrom, 8 Env. L. at 527-33. With

minor qualifications designed to account for environmental concerns, Congress opted in favor of letting the Forest Service determine when even-aged management was appropriate. Senator Humphrey's bill, which gave considerable deference to Forest Service's expertise, passed by a vote of 90 to 0. *Id.* at 528 (citation omitted). The House bill passed by a vote of 305 to 24. *Id.* (citation omitted). President Ford signed the National Forest Management Act into law in October of 1976. *Id.* In all, it took only 14 months for Congress to respond to the Fourth Circuit's affirmance of the decision in *Monongahela* banning clearcutting. *Id.* (citation omitted).

In imposing its own standards of what constitutes sound forestry, the Sixth Circuit displayed utter disregard for the intent of Congress in passing the National Forest Management Act and for the expertise and integrity of the Forest Service in carrying out its statutory duties. This Court should reverse the decision of the court below for overstepping its proper role in applying the law, rather than creating it.

CONCLUSION

One hundred years ago, Congress created the National Forest System to assure that United States citizens would have a continuous supply of timber. The value of this resource is underscored by the fact that wood and wood products continue to be of tremendous utility and necessity. While forests provide other resources for recreation and a healthy environment, Congress has steadfastly adhered to the principle that, for lands specifically set aside as national forests, the balance of needs favor the practical and tangible commodities that timber can provide. In finding that the Forest Service's emphasis on timber production constituted "bias," the Sixth Circuit ignored both statutory language and legislative history surrounding the congressional enactments governing national forest lands and the Forest Service's obligations in managing them. This Court

should reject the Sixth Circuit's ruling, and hold that the production of timber for harvesting is not merely a legitimate goal of the Forest Service in managing national forests, but a statutory obligation.

Congress also understood that forest management is best practiced by forestry professionals, rather than legislators or judges. Congress thus delegated a great deal of discretion to the Forest Service to make basic decisions about the management of National Forest System lands, including determining when responsible management practices dictate the use of clear-cutting. The Sixth Circuit's creation of the "exceptional circumstances" standard for determining when clearcutting may be used is thus unsupportable. This Court should reject this judicially imposed standard and restore the proper standard: whether facts in the record support Forest Service decisions to clearcut based upon the applicable statutory guidelines.

For the reasons stated above, this Court should reverse the decision of the Sixth Circuit holding that the Forest Service acted arbitrarily and capriciously in developing the Land and Resource Management Plan for the Wayne National Forest.

DATED: December, 1997.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC.

Petitioner,

v.

SIERRA CLUB, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE ALABAMA FORESTRY ASSOCIATION, AMERICAN PULPWOOD ASSOCIATION, ARKANSAS FORESTRY ASSOCIATION, ASSOCIATED OREGON LOGGERS,

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AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

QUESTION PRESENTED

Amici will address the following question:

Whether the court of appeals erred in refusing to accord any deference to the decision of the United States Forest Service in this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-16

OHIO FORESTRY ASSOCIATION, INC.

Petitioner,

v.

SIERRA CLUB, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE ALABAMA FORESTRY ASSOCIATION, AMERICAN PULPWOOD ASSOCIATION, ARKANSAS FORESTRY ASSOCIATION, ASSOCIATED OREGON LOGGERS, CALIFORNIA FORESTRY ASSOCIATION, FLORIDA FORESTRY ASSOCIATION, INDIANA HARDWOOD LUMBER ASSOCIATION, KENTUCKY FOREST INDUSTRIES ASSOCIATION, LUMBERMENS ASSOCIATION OF TEXAS, MICHIGAN ASSOCIATION OF LUMBERMEN, TIMBER PRODUCERS ASSOCIATION OF MICHIGAN AND WISCONSIN, NATIONAL OAK FLOORING MANUFACTURERS ASSOCIATION, NATIONAL HARDWOOD LUMBER ASSOCIATION, NATIONAL WOODEN PALLET & CONTAINER ASSOCIATION, NORTH AMERICAN WHOLESALE LUMBER ASSOCIATION, NORTHEASTERN LOGGERS ASSOCIATION, SOUTHERN TIMBER PURCHASERS COUNCIL, STRUCTURAL BOARD ASSOCIATION,

INC., TENNESSEE FORESTRY ASSOCIATION, TEXAS FORESTRY ASSOCIATION, WASHINGTON CONTRACT LOGGERS ASSOCIATION, AND WEST VIRGINIA FORESTRY ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici are national, regional, and state trade associations representing all aspects of the forest products industry. All have a continuing interest in access to a stable and consistent supply of timber from the national forest system. *Amici* therefore have a compelling interest in the issue presented here: when decisions of the United States Forest Service (the "Forest Service" or "Service") regarding the management of national forests are due deference.

In this case, the Sixth Circuit rejected a long-range plan for management of the Wayne National Forest that was developed by the Forest Service, a federal administrative agency within the Department of Agriculture. The court of appeals found the plan flawed because it permitted "even-aged management," a common forestry practice that creates stands in which trees of approximately the same age grow together. Asserting that the Forest Service is politically driven and biased in favor of logging interests, the court of appeals concluded that the agency's decision to allow even-aged management was entitled to no judicial deference.

Unless set aside, this decision will have serious and destructive consequences for *amici* and their members. It will work a significant interference with the cultivation and harvesting of timber. It will prevent the development of rational plans for the management of national forests. And it will cast into doubt *all* administrative proceedings conducted by the Forest Service — proceedings that regularly affect *amici*. For these reasons, *amici* submit this brief to assist the Court in the

resolution of this case.[1]

SUMMARY OF ARGUMENT

The Forest Service's decision in this case should have been accorded the most substantial deference. As a general matter, of course, courts must defer to administrative decisions in areas within the agency's expertise. And that rule applies with special force here because Congress has granted the Forest Service considerable discretion in balancing the multiple, and sometimes conflicting, goals of the National Forest Management Act of 1976 ("NFMA"). At the same time, the formulation of a Land and Resource Management Plan ("LRMP") necessarily turns on the exercise of technical and scientific judgments involving a wide range of interests — a factor that, again, militates in favor of deferring to the agency.

The Sixth Circuit's holding in this case, however, simply substituted its judgment for that of the Forest Service. Without *any* citation to the record or to the bases for the agency's decision, the court rejected the agency's conclusions out of hand. That was plain error. In fact, the Forest Service's LRMP was the product of a careful and thorough administrative decisionmaking process that was explained in detail, that was fully grounded in the record, and that expressly sought to balance the competing interests served by the statute. In contrast, the court of appeals' conclusion was premised on a series of simplistic ipse dixits that apparently were derived from its own preconceptions.

The error in the Sixth Circuit's decision was compounded by its bizarre conclusion that the Forest Service is due no

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[1] The parties have consented to the filing of this *amicus curiae* brief; letters indicating their consent have been filed with the Clerk of the Court. In addition, pursuant to this Court's Rule 37.6 *amici* certify that counsel for a party did not author this brief in whole or in part, and that no person other than *amici* made a monetary contribution to the preparation of the brief.

deference because it is institutionally biased. That conclusion was grounded on a misuse of the controlling statutes: the examples of "bias" cited by the court all involve structures and relationships created by Congress. And more fundamentally, the Sixth Circuit overstepped the proper judicial role. Any institutional problems in the operation of the Forest Service should be addressed by the political branches; "federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do." *Chevron USA Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 866 (1984).

ARGUMENT

THE FOREST SERVICE'S DECISION ADOPTING THE WAYNE LRMP WAS ENTITLED TO DEFERENTIAL REVIEW

The Sixth Circuit's decision in this case may fairly be characterized as astonishing. Declining to burden its decision with even a *single* citation to the administrative record, the court of appeals held the Forest Service's adoption of a detailed and elaborate LRMP to be arbitrary and capricious. Pet. App. 5a-6a.[2] The court then capped its excursion through the looking glass with the remarkable assertion that Forest Service decisions are due no deference at all because the agency suffers from institutional "biases" that "undermine[] even the facial neutrality of the National Forest Management Act." *Id.* at 8a. Because the Sixth Circuit again failed to tie this surprising conclusion to anything in the record, the court appears to have held as a matter of law that Forest Service decisions *never* are due deference.

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[2] The court contented itself with the blithe declaration that "it would be impractical to set forth the details of the administrative record here." Pet. App. 5a. Since other courts routinely set forth such details in their opinions, it is perhaps not surprising that the Sixth Circuit failed to elaborate upon this curious remark.

These conclusions plainly cannot be squared with the most fundamental principles of administrative law. A central tenet of our system of judicial review is that courts must defer to agency decisions. That rule applies with special force when, as here, the agency has applied its technical expertise in an area where it has been accorded substantial discretion by Congress. And in every case, agencies are presumed to operate with regularity and in good faith. The Sixth Circuit, however, managed to disregard *each* of these principles. Against that background, as this Court observed in another case where the lower court famously lost sight of basic tenets governing agency review, "[t]o say that the Court of Appeals' * * * reason for [setting aside the agency's decision] is insubstantial at best is a gross understatement." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557 (1978).

A. Courts Must Review Deferentially The Forest Service's Decision To Adopt A Land And Resource Management Plan

1. It should go without saying that, under the Administrative Procedure Act, courts may set aside agency action only if the action "was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements.'" *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414 (1971) (quoting 5 U.S.C. § 706(2)). This means, of course, that the reviewing court must not substitute its judgment for that of the agency, but instead must determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416.

As a consequence, it is a fundamental and oft-stated principle of administrative law that agencies are better equipped than are the courts to make determinations regarding matters within the agency's area of special competence. Thus, when reviewing factual determinations whose analysis "'requires a

high level of technical expertise,'" a court "must defer to 'the informed discretion of the responsible federal agenc[y].'" Marsh v. *Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989) (quoting *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976)). See also, *e.g.*, *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, * * * a reviewing court must generally be at its most deferential"). "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378.

By the same token, it is basic that courts must avoid interfering with policy choices delegated to an agency by Congress. Where decisions "necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns," courts "appropriately defer to the agency entrusted by Congress to make such policy determinations." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991); see also *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995) ("When Congress has entrusted [an agency] with broad discretion, we are especially reluctant to substitute our views of wise policy for [the agency's]."") And deference is of particular importance when an agency resolves "competing interests which Congress itself * * * intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Chevron USA*, 467 U.S. at 865-866.

2. These principles require that the Forest Service decision in this case be accorded the greatest possible degree of deference. While the Sixth Circuit evidently was of the view that the NFMA imposes strict and inflexible constraints on the Service (see Pet. App. 5a-6a), Congress actually gave the agency broad discretion in the adoption of an LRMP. At the same time, the formulation of an LRMP necessarily turns on the exercise of technical and scientific judgments that must balance

a range of interests and goals. In these circumstances — where the agency's decision "'involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations'" (*Chevron USA*, 467 U.S. at 844, quoting *United States* v. *Shimer*, 367 U.S. 374, 382 (1961)) — deference plainly is in order.

a. Congress has directed that the national forests be managed to achieve several different, often competing, goals. National forests were first established for "only two purposes — '[t]o conserve water flows, and to furnish a continuous supply of timber for the people.'" *United States* v. *New Mexico*, 438 U.S. 696, 707 (1978) (citation omitted). See 16 U.S.C. § 475. In 1960, Congress enacted the Multiple-Use Sustained Yield Act ("MUSYA"), providing that the forests "shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Id.* § 528.[3] That Act directs the Secretary of Agriculture "to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom." *Id.* § 529. The MUSYA defines "multiple use" as the management of resources so that they "will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services." *Id.* § 531. As one court of appeals has stated, these broad directives "breathe[ ] discretion at every pore." *Perkins* v. *Bergland*, 608 F.2d 803, 806 (9th Cir. 1979) (quotations omitted) (citation omitted).

The Forest Service has been delegated the challenging task of administering the national forests in a manner that most

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[3] The new uses were "declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established." *Ibid.*

appropriately advances these varied and competing purposes. Under the NFMA, the Forest Service must adopt and periodically revise for each national forest a long-range plan (the LRMP) that, consistent with the MUSYA, "provide[s] for multiple use and sustained yield of the products" of the national forest, and, in particular, "include[s] coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wildernesses." 16 U.S.C.§ 529.

Accordingly, the NFMA mandates long-range planning by the agency, but provides only the most general guidelines for the content of plans. The statute directs the agency to establish by regulation specific guidelines for developing LRMPs that further the broad goals of the program by, for example, "insur[ing] consideration of the economic and environmental aspects of various systems of renewable resource management" (16 U.S.C. § 1604(g)(3)(A)); "provid[ing] for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives" (*id.* § 1604(g)(3)(B); and "permit[ting] increases in harvest levels based on intensified management practices" (*id.* § 1604(g)(3)(D)).

The Forest Service, acting with the assistance of a panel of scientific advisers, has promulgated detailed regulations designed to satisfy these requirements. See 36 C.F.R. Part 219. Among other things, the regulations create procedures designed to assist the Forest Service in balancing the competing goals of national forest management. For example, for each LRMP, an interdisciplinary team formulates "a broad range of reasonable alternatives" intended to "provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits." 36 C.F.R. §219.12 (f).

It could not be clearer that managing the national forests under these statutes requires the Forest Service to make policy judgments that balance the competing legislative goals. As the Fifth Circuit has observed, "protecting forest resources involves

making trade-offs." *Sierra Club* v. *Espy*, 38 F.3d 792, 802 (5th Cir. 1994); see also *Mountain States Legal Foundation* v. *Glickman*, 92 F.3d 1228, 1238 (D.C. Cir. 1996) (forest management statute's statement of a particular purpose "does not mean that [such purpose] must be maximized at the expense of all other values"). Indeed, the Forest Service inevitably makes such trade-offs each time it develops an LRMP. See *Big Hole Ranchers Ass'n, Inc.* v. *United States Forest Serv.*, 686 F. Supp. 256, 264 (D. Mont. 1988) (Forest Service in developing LRMP "has wide discretion to weigh and decide the proper uses within each area"); cf. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 358 (1989) (Forest Service operates under "broad grant of authority" under 16 U.S.C. 479 to permit use and occupancy of national forests).

b. At the same time, the agency's judgments are informed by its substantial expertise in the various sciences relevant to forest management, including the field of silviculture. Managing a healthy forest cannot turn on the sorts of simplistic formulas offered by the Sixth Circuit. See, *e.g.*, Pet. App. 6a ("recreation like fishing and hiking is harmed by clearcutting"). Instead, the agency must make a range of highly technical judgments about the management techniques that will contribute to the diversity of plant and animal life; that will support the effective use of (and facilitate access to) the forest for recreational purposes; that will allow for sustainable production of timber; and that will maintain the forest's health.

As explained in a classic text on the subject:

> Silviculture has been variously defined as: the art of producing and tending a forest; the application of the knowledge of silvics in the treatment of a forest; the theory and practice of controlling forest establishment, composition, and growth.
>
> * * *

> The efficient practice of silviculture * * * demands as much knowledge of such fields as ecology, plant physiology, entomology, and soil science (to name but a few) as a forester can acquire.

DAVID SMITH, THE PRACTICE OF SILVICULTURE 1-2 (7th Ed. 1962). See also RALPH NYLAND, SILVICULTURE: CONCEPTS AND APPLICATIONS 8 (1996) ("[S]ilviculturists draw upon the principles and theory amassed through scientific inquiry in botany, zoology, soil science, physical sciences, ecology, silvics, managerial science, economics and quantitative methods".). The courts have thus recognized that "'silviculture' is in fact a technical field, and not just one with a dry and forbidding vocabulary." *Cronin* v. *United States Dep't of Agriculture*, 919 F.2d 439, 444 (7th Cir. 1990). Accordingly, "it is imprudent for generalist judges * * * to consider testimonial and documentary evidence bearing on [silvicultural] questions unless the evidence has first been presented to and considered by the agency." *Ibid.* "The court must assume the Forest Service fully understands the technical aspects of forest management and deserves the benefit of the doubt on their decisions that required consideration of these issues." *Inland Empire Public Lands Council* v. *Schultz*, 807 F. Supp. 649, 652 (E.D. Wash. 1992).

Indeed, Congress emphasized that very point when it enacted the NFMA, remarking on the technical nature of the matters committed to the Forest Service's discretion. In a principal statement of Congress's purpose, Senator Humphrey declared that the NFMA was "designed to get the practice of forestry out of the courts and back to the forests." 122 Cong. Rec. 33835 (Sep. 30, 1976). Other members of Congress echoed the importance of leaving matters in the hands of the Forest Service. Senator Packwood, for example, stated that

> [w]e have a bill designed to cover a broad range of forest conditions and management practices. Yet, this is accomplished without the Congress tying the hands of the

> Forest Service. * * * It is a recognition that no two forests are alike, and that prescriptive legislation is more often a handicap than a help to forest management professionals.

122 Cong. Rec. 33838 (Sept. 30, 1976). See also, *e.g.*, 122 Cong. Rec. 34229 (Sept. 30, 1976) (remarks of Rep. Symms) ("Detailed prescriptive language was specifically avoided, since it was recognized that it would be impossible to write into law detailed requirements which would fit the tremendously varied forest and rangeland conditions that exist on the national forests."); *ibid.* (remarks of Rep. Weaver) (NFMA "establishes * * * a framework of public policy for national forest management, and leaves on the ground forest management to the foresters. * * * It does not prescribe forestry techniques.")[4]

For these reasons, so long as the Forest Service's judgments are "not unreasonable," a court must "defer to the agency's determination." *Espy*, 38 F.3d at 802; see also, *e.g.*, *Sierra Club* v. *Cargill*, 11 F.3d 1545, 1458 (10th Cir. 1993) ("Applying the deferential standard is especially important where, as here, the agency determination is extremely fact-bound"). Here, the Forest Service amply justified its decision to allow even-aged management in the Wayne National Forest, by reference to both policy and science. There was no basis for the court of appeals to second-guess — or, worse, entirely ignore — the agency's reasonable judgments.

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[4] The Senate Subcommittee on Public Lands, in recommending guidelines for timber harvesting, previously had stated that it "did not presume to substitute its judgment for that of qualified professionals who have on-the-ground knowledge and familiarity with local needs and conditions." Staff of Sen. Subcomm. on Public Lands, 92d Cong., 2d Sess., Clearcutting on Federal Timberlands, Report to the Comm. on Interior and Insular Affairs 8 (Comm. Print 1972).

B. The Court of Appeals Improperly Disregarded The Forest Service's Technical and Policy Reasons For Adopting Particular Silvicultural Management Practices

In light of the complex array of factors that go into the formulation of an LRMP, it is not surprising that the Forest Service's decision in this case did — as, indeed, every decision under the NFMA must — involve an application both of the agency's technical scientific expertise and of its considered discretion. The court of appeals, however, gave no deference at all to the Forest Service's decision. While grudgingly mouthing the standard governing the review of agency action,[5] the Sixth Circuit proceeded to substitute its own judgment for that of the agency. Without *any* citation to the record or to the bases for the Forest Service's decision, the court rejected out of hand the Service's conclusion that "its even-aged management plan * * * will provide new opportunities for recreation that will, in turn, preserve and enhance the diversity of plant and animal communities in the Wayne National Forest." Pet. App. 6a.[6] In doing so, the Sixth Circuit entirely disregarded the legitimate reasons and substantial evidence that underlay the Forest Service's decision to permit even-aged management in the Wayne forest.

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[5] The court stated: "[W]e must decide whether the Forest Service took a hard look at the relevant factors and reached a decision that was neither arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law." Pet. App. 5a.

[6] The court of appeals also found that the Forest Service had improperly decided to "utilize even-age management logging as if it were the statutory rule, rather than the exception." Pet. App. 6a. As the brief for petitioner demonstrates, however, the court of appeals' view that the NFMA disfavors even-aged logging was plainly wrong. See *Sierra Club* v. *Espy*.

There are two recognized systems for administering timber resources: even-aged management and uneven-aged management. As the district court correctly observed when it affirmed the Forest Service decision:

> The selection of the appropriate system and harvest method depends upon the judgment of the forest planner, taking into consideration the circumstances of the forest or subparts thereof, the goals of the forest plan and all applicable statutory and regulatory mandates.

Pet. App. 16a. As the district court also noted, "[e]ach silvicultural system and its respective harvest methods have advantages and disadvantages." *Ibid.* (footnote omitted). And broad discretion is most important at the preliminary stage where the LRMP is formulated, because the final selection of a harvest method occurs when the decision is made to hold a site-specific timber sale.

Choosing a forest management method thus requires complex technical judgments on how best to juggle competing interests. For example, as the Forest Service made clear in this case, uneven-aged management aims at maintaining stands of trees that contain a range of age classes in each area. LRMP at C-3. This management system provides for the periodic harvest of a portion of the trees in each age class in each stand, either individually or in selected groups. *Id.* at C-1. Uneven-aged management preserves an uninterrupted leaf canopy, making logging activity less obvious to recreationists, but also encourages a forest-wide decline in shade intolerant plant and animal species — including the most commercially valuable trees. *Id.* at C-2.

Even-aged management, in contrast, creates a mosaic of different-aged stands, each containing trees of about the same age. *Id.* at C-3. The three recognized harvest methods for this management technique are clearcutting, shelterwood, and seed tree. Clearcutting involves cutting down all trees in an area at one time; the shelterwood method involves removing all trees

in a series of two to three cuts; and the seed tree method involves harvesting all but a few well-distributed trees, which are themselves removed after they provide seed for natural regeneration. *Id.* at C-4. In contrast to uneven-aged management, which allows only shade-tolerant species to flourish, even-aged management permits the periodic regeneration of plant and animal species that thrive in direct sunlight. *Id.* at C-2.

The Forest Service amply supported its preliminary selection of even-aged management for many areas in the Wayne National Forest. First, the Service concluded that even-aged management is "necessary" to maintain "high quality hardwoods on a sustained yield basis." *Id.* at C-6 . The Service supported this conclusion by reference to the specific growing conditions of various tree species in the Wayne National Forest. See, *e.g.*, Draft Environmental Impact Statement (DEIS) at 4-19; LRMP at C-6 to C-7. The Service also concluded that even-aged management would, among other things, increase species diversity by permitting the periodic regeneration of plants and animals that use forest clearings as habitat (DEIS at 4-18); create forest stands that are "more resistant to insect and disease attacks" (Final Environmental Impact Statement (FEIS) at 2-17); permit longer intervals between harvest activity, thereby minimizing disruption in each area (LRMP at C-3); and increase opportunities for certain recreational activities, including hunting (FEIS at 2-16). The court of appeals offered *absolutely no reason* to believe that these judgments were erroneous.

The Forest Service also supported its initial approval of clearcutting as the harvest method in many areas. The Service found clearcutting to be "the most effective method" for obtaining "desirable natural regeneration in central hardwood stands." LRMP at C-4. The Service observed that clearcutting "normally results in more seedlings and new sprouts than any other harvest method." *Ibid.* Moreover, the Service concluded:

> [c]learcutting is especially appropriate for stands where the residual trees would not be worth retaining for a future crop, when stands have had the best trees removed in past harvests, or in areas which have insufficient trees to adequately use growing space.

Id. at C-5. The Service also noted that clearcutting "imitate[s] nature" by reproducing the natural clearing that "occurs as a result of wildfire, wind, insects and disease." FEIS at 2-18. Again, the court of appeals offered no reason to doubt — indeed, it failed even to note — these conclusions.

By including even-aged management as part of the overall LRMP, the Forest Service expressly sought to balance the competing values served by the statute. The agency's efforts to accommodate those interests are reflected in its extensive responses, set forth in the FEIS, to the many public comments on the proposed LRMP. For example, the Service fielded comments from those who sought *more* clearcutting, which the commenters believed would more rapidly improve timber quality. Noting that "changes which are perceived as desirable to one person may be undesirable to another," the agency responded:

> [b]ecause the National Forest is managed under the concept of multiple uses to best meet the needs of the people we attempt to provide a wide range of conditions throughout the Forest. We do not intend to emphasize timber management any more than other resources but do recognize it as an important tool to help achieve our long-term management objectives.

FEIS at 2-20. On the other hand, in responding to those supporting maintenance of a "nearly continuous forest canopy," and who therefore opposed all clearcutting, the agency noted that even extensively logged management areas would have no more than 10 percent "open canopy" from clearcutting at any time. FEIS at 2-23. The agency's ultimate decision, quite

clearly, reflected its considered view of the proper compromise between widely divergent public interests.

In these circumstances, the agency's decision "represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Chevron U.S.A.*, 467 U.S. at 865 (footnotes omitted). In contrast, the court of appeals' conclusion was premised on a series of simplistic ipse dixits that apparently were derived from its own preconceptions. The Sixth Circuit thus offered the platitude that "[m]ost recreation does not require timber harvesting" (Pet. App. 6a), an observation that entirely disregarded the Service's findings about the benefits for new recreational opportunities and species diversity offered by its even-aged management plan. And the court opined that "recreation like fishing and hiking is harmed by clearcutting" (*ibid.*), wholly ignoring the Service's conclusions about the ways in which its plan would advance forest health, increase the diversity of plant and animal communities, permit longer intervals between harvest activity, and facilitate recreational activities such as hunting. Given the agency's well-considered and factually grounded decision, it is impossible to avoid the conclusion that the court of appeals came to its holding "simply because the court [was] unhappy with the result reached" by the Service. *Vermont Yankee*, 435 U.S. at 558.

C. The Sixth Circuit's Unsupported Allegations of Agency "Bias" Did Not Justify Its Failure To Defer To The Agency

The court of appeals' decision thus reflects a manifest departure from the ordinary rules governing the review of agency decisions. The most bizarre aspect of the Sixth Circuit's holding, however, was its breezy conclusion that the Forest Service is due no deference because the agency is institutionally

"biase[d]" (Pet. App. 8a) and because "forest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse." *Id.* at 7a. This conclusion is premised on a misunderstanding both of the governing statutes and of the court's role.

1. The Sixth Circuit identified several sources of what it termed the Forest Service's "bias." But the court of appeals evidently mistook for bias the Service's legitimate, and congressionally-mandated, institutional mission. For example, the court of appeals complained that "the Forest Service has a history of preferring timber production to other uses." *Ibid.* But as the court itself recognized, timber production has historically been the *primary* purpose of the national forests, which were "[c]reated, in part, to ensure a reliable timber supply." *Ibid.* Although the MUSYA expanded the aims of national forest management to accommodate additional uses, this Court has described these new uses as "secondary" to the original purposes. *United States* v. *New Mexico*, 438 U.S. at 715. Thus, even today, "[t]imber harvesting is clearly a major goal of the forest management statutes." *Mountain States Legal Foundation*, 92 F.3d at 1238.

The court of appeals also identified as a source of bias the "sharing of timber proceeds with local communities." This, the court opined, increases the "dependency of these communities on timber production," which both encourages the Forest Service to "make management decisions to support perceived needs in the communities" and "causes over-harvesting and destructive harvesting methods." Pet. App. 7a. But this "sharing," however harmful the court may deem it, is mandated by statute. See 16 U.S.C. § 500. The court could not properly overturn the agency's decision based on its own view that the management of national forests is too closely tied to the fate of neighboring rural communities, especially when Congress created structures designed to further such linkage.

Similarly, the court cited as a source of bias the fact that the Forest Service budgeting process "allows the Forest Service to keep a percentage of the funds it realizes from timber sales." Pet. App. 7a. But this agency revenue-sharing also was specifically mandated by Congress. See 16 U.S.C. § 576b-576d. If such statutory provisions — which the court termed "biases and constraints" — indeed influence the agency's decisionmaking process, Congress must be presumed to have intended such effects, and the court may not disregard the agency's views for that reason.

In addition, the court of appeals voiced concern that, in response to petitions from "local constituencies," "politicians" may "place pressure on the Forest Service" to sustain the revenue flowing from timber harvesting. Pet. App. 7a. But the political process *quite properly* may affect the exercise of agency discretion to make policy judgments. As the D.C. Circuit has stated:

> Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of those officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at * * * lobbying efforts * * * merely because we see them as inappropriate in the judicial context.

Sierra Club v. *Costle*, 657 F.2d 298, 400-401 (D.C. Cir. 1981) (footnotes omitted). Furthermore, "Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws." *Id.* at 409. Nor do such pressures operate in only one direction. Recreationists, environmentalists, businesses dependent on

tourism, and other interest groups can and do seek to influence Forest Service decisions.

So long as "political pressure" does not go beyond legitimate bounds (see, *e.g.*, *District of Columbia Fed'n of Civic Ass'n* v. *Volpe*, 459 F.2d 1231, 1245-46 (D.C. Cir. 1971)), such activity does not impugn an agency's decisions or justify more searching judicial review. In this case, the Court of Appeals identified no evidence to suggest that the Forest Service had been influenced *improperly* in its decision to adopt the LRMP. Under these circumstances, the Forest Service was entitled to a presumption of good faith in its decisionmaking. See *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

2. While the court of appeals thus misunderstood the relevant statutory context, its more basic error lay in confusion about which branch of government has the authority to answer "fundamental policy questions." *Vermont Yankee*, 435 U.S. at 558. Unless an agency's decision is inconsistent with law or unsupported by the evidence, a court may not set that decision aside simply because individual judges believe that the agency has a bad attitude.

> Judges * * * are not part of either political branch of government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, * * * [w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.

Chevron U.S.A., 467 U.S. at 865. It therefore is a central tenet of our system that

> federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do. The responsibility for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Id. at 866, quoting *TVA* v. *Hill*, 437 U.S. 153, 195 (1978).

If the President believes that the Forest Service is too responsive to the needs of local communities (see Pet. App. 7a), he may (insofar as his actions are consistent with governing statutes) change the Service's orientation. And if Congress fears that institutional constraints on the Forest Service distort the agency's decisions, it may inquire into the matter and cure any problems through legislation. But a court is in no position to determine, as a general matter, that a particular agency is failing to act "in the best interest of the American people." Pet. App. 8a. The Sixth Circuit's attempt to make such a determination here should not stand.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted.

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No. 97-16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC.,
Petitioner,

v.

SIERRA CLUB, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Date: December 16, 1997

QUESTION PRESENTED

Amici curiae address the following question only:

Is there a justiciable controversy on Respondents' facial challenge to a long-term federal land use plan (the Forest Plan for the Wayne National Forest), where that Plan does not provide authority to engage in any ground-disturbing activity?

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief, in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

its resources to promoting civil justice reform. To that end, WLF has appeared before this Court as well as other federal and state courts to support rules limiting entry into federal court to those who have suffered, or imminently will suffer, a distinct injury at the hands of the defendant. *See, e.g., Lujan v. Defenders of Wildlife ["Defenders"]*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Fed'n ["NWF"]*, 497 U.S. 871 (1990).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned that the federal courts not become -- through underenforcement of rules regarding standing and ripeness -- some sort of super administrative agency, with the power to second-guess each and every decision made by the Executive Branch of government. The judiciary is, of course, limited by Article III of the Constitution to resolving cases and controversies, and plaintiffs cannot be said to have raised a case or controversy unless they can demonstrate that the action of which they complain has inflicted on them a distinct injury. Because *amici* have no direct interest in the underlying merits of Respondents' claims, *amici* believe they bring to the Court a point of view distinct from that of any party.

Amici submit this brief in support of Petitioner with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement of the Case in Petitioner's brief.

In brief, Respondents Sierra Club and Citizens Council on Conservation and Environmental Control (referred to collectively as "Sierra Club") are challenging the adequacy of a long-term management plan (the "Wayne Forest Plan" or the "Plan") adopted in 1988 by the United States Forest Service in connection with the Wayne National Forest in Ohio; they also challenge the final Environmental Impact Statement ("EIS") issued in conjunction with the Plan.

The National Forest Management Act of 1976 (NFMA) creates a duty on the part of the Forest Service to adopt such a long-term management plan (known as a "land and resource management plan" or "LRMP") for each national forest or group of national forests in the United States. 16 U.S.C. § 1604. The NFMA makes clear that LRMPs are long-term planning documents: it provides that such plans are to remain in effect for 10 to 15 years, after which they are replaced by revised plans. 16 U.S.C. § 1604(f)(5). By regulation and pursuant to the National Environmental Policy Act (NEPA), the Forest Service routinely prepares an EIS in conjunction with each LRMP.

In the 20 years since adoption of the NFMA, the Forest Service generally has not included in LRMPs authority for anyone to engage in ground-disturbing activity (such as timber cutting). *See* Brief of Federal Respondents in Opposition to Certiorari Petition ("U.S. Br.") 3-4. Rather, no such activity is permitted to go forward until the Forest Service has determined whether the activity is

consistent with the LRMP and also has assessed the likely environment effects of the activity. *Id.* at 4.

Following several years of preparation, the Wayne Forest Plan was approved by the Forest Service's Regional Forester in January 1988. The Sierra Club and the Citizens Council on Conservation and Environmental Control filed administrative appeals, contending that the Plan provided for excessive amounts of lumbering (and, in particular, of lumbering employing "even-aged management" techniques) within the Wayne National Forest. The Chief of the Forest Service denied those appeals and affirmed the Wayne Forest Plan on November 14, 1990 and January 14, 1992. Pet. App. 66a-77a; 78a-80a.

In January 1992, the Sierra Club filed suit under the Administrative Procedure Act in U.S. District Court for the Southern District of Ohio, challenging the propriety of the Wayne Forest Plan and its accompanying final EIS. The Sierra Club alleged that the Plan violated the NFMA and NEPA in several respects. Pet. App. 133a-145a. It alleged a right to review under 5 U.S.C. § 704, which provides for judicial review of "final agency action for which there is no other adequate remedy." Named as defendants in their official capacities only were the Secretary of Agriculture and several Forestry Service officials. Petitioner Ohio Forestry Association thereafter intervened in the suit on the side of the defendants.

The district court granted summary judgment to the defendants on March 11, 1994. Pet. App. 10a-48a. In doing so, the district court reached the merits of the Sierra Club's claims without any discussion of the suit's justiciability, an issue not raised by any defendant.

Following the Sierra Club's appeal to the U.S. Court of Appeals for the Sixth Circuit, the appellees sought affirmance on the ground, *inter alia,* that the suit was not justiciable. The Sixth Circuit disagreed, finding both that the Sierra Club had standing to filing suit and that the case was ripe for review. *Id.* 3a-4a. Addressing the merits, the Sixth Circuit concluded that the Wayne Forest Plan was adopted arbitrarily and capriciously in that it failed to comply with the NFMA. *Id.* at 8a. The Sixth Circuit reversed the district court's grant of summary of judgment and remanded the case to the district court "for further proceedings consistent with this opinion." *Id.*

This Court granted the Ohio Forestry Association's petition for a writ of certiorari on October 20, 1997.[2] The petition raises two separate issues -- whether the Sierra Club's claims are justiciable, and whether the Sixth Circuit erred in its merits rulings favoring the Sierra Club. This brief addresses only the first of those two issues.

SUMMARY OF ARGUMENT

The Court should not reach the underlying merits of Respondents' claims because the case quite clearly is not justiciable in the federal courts. Their claims are not ripe for review, and they lack standing to raise those claims.

Respondents have made none of the three showings that a plaintiff must demonstrate in order to establish standing in federal court. They have not suffered any "injury in

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[2] Although the Federal Respondents opposed granting the writ, they made clear in their opposition brief that they disagreed with the Sixth Circuit decision, with respect both to justiciability and to the legality of the Wayne Forest Plan. U.S. Br. 12.

fact," because any possible injury is not imminent, and will not come about unless and until the Forest Service makes additional site-specific determinations that are not pre-ordained by the Wayne Forest Plan. While Respondents complain of the loss of procedural rights, such loss has never been deemed sufficient to establish "injury in fact" unless the plaintiff can demonstrate that the loss is likely to impair some "separate concrete interest" (s)he possesses. Second, any injury suffered by Respondents is not fairly traceable to adoption of the Wayne Forest Plan; any lumbering that has taken place at the Wayne National Forest cannot be said to have been the inevitable result of adoption of the Plan. Third, any injury suffered by Respondents is unlikely to be redressed by an order invalidating the Plan, because the Forest Service possesses authority to proceed with timber operations that is independent of the Plan.

Respondents' claims also are not ripe for review. *Amici* note in particular that the decision-making process with respect to whether timber operations should proceed at any specific site in the Wayne National Forest is not made complete by virtue of adoption of the Plan. When a decision is made to go ahead with timbering at a particular location, any challenge to that decision would be ripe, but that decision would not make the Plan itself any more ripe.

ARGUMENT

I. RESPONDENTS LACK ARTICLE III STANDING TO CHALLENGE EITHER THE WAYNE FOREST PLAN OR ITS ACCOMPANYING FINAL EIS

While the federal government is empowered under the United States Constitution to resolve many types of disputes, this Court has repeatedly made clear that only a

portion of those disputes are properly resolvable within the judiciary. One well-developed doctrine that "serves to identify those disputes which are appropriately resolved through the judicial process" is the doctrine of standing. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Because the Sierra Club has failed to demonstrate any of the three elements necessary to establish its standing, the federal judiciary lacks jurisdiction to hear Respondents' claims.

The Court recently summarized the three elements of standing as follows:

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, *see [Allen v. Wright*, 468 U.S. 737,] 756 [1984]; *Worth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-741 n.16 (1972); and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" *Whitmore, supra*, 495 U.S. at 155 (quoting *Los Angeles v. Lyons*, 461 U.S. 95 (1983). Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision." *Id.* at 38, 43.

Defenders, 504 U.S. at 560-61.

Amici will address, in turn, the Sierra Club's deficiencies with respect to each of those three elements.

A. Any Injury to Respondents Based on Adoption of the Wayne Forest Plan Is Conjectural and Not Imminent and Thus Does Not Constitute "Injury in Fact"

The Sierra Club alleges two deficiencies in the Wayne Forest Plan: (1) too large a portion of the Wayne National Forest was made available for timbering; and (2) too much of the timber harvesting was to consist of clearcutting. Neither the Sierra Club nor its members can be said to have been subjected to "imminent" injury as a result of either alleged deficiency.

There is simply nothing in the Wayne Forest Plan that authorizes *any* type of ground-disturbing activity within the Wayne National Forest. Indeed, in rejecting appeals from approval of the Wayne Forest Plan, the Forest Service emphasized precisely that point: no timber sales would be authorized until after completion of site-specific inquiries in which interested members of the public would be permitted to participate. Pet. App. 70a, 75a-76a, 100a. Given that the Wayne Forest Plan pre-ordains no specific logging operations, the Plan cannot be said to threaten imminent injury to Respondents' ability to view undisturbed lands in any specific portion of the Wayne National Forest.

The Sierra Club argues that its faces imminent injury because its ability to challenge programmatic determinations underlying the Wayne Forest Plan will be lost unless it is granted standing to challenge the Plan in court. Sierra Club Brief in Opposition to Petition ("Opp. Br.") 15-16. The Sierra Club asserts:

> [I]f the agency action could only be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never.

Id. (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (1992)). In its decision below, the Sixth Circuit also cited *Mumma* in support of the same argument. Pet. App. 4a.

The fallacy in the Sierra Club's and the Sixth Circuit's argument is that the Wayne Forest Plan does *not* "pre-determine[] the future." While future logging in the Wayne National Forest is more likely than if the Wayne Forest Plan had included no provision for logging, the fact remains that logging at any specific site in the forest must be deemed "conjectural" because no such logging will be permitted until the Forest Service conducts a site-specific review regarding the propriety of logging at that site.[3] Indeed, experience bears out the Forest Service's claim that the Plan does not pre-ordain that logging will take place at any specific site: on two occasions following adoption of the Plan, the Sierra Club has persuaded the Forest Service not to permit proposed clearcutting at specific sites within the Wayne National Forest. U.S. Br. 16 n.11. Moreover, the level of lumbering activity in the Wayne National Forest since adoption of the Plan in 1988 has been far lower than the projected level. *Id.* at 16-17.

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[3] And, of course, in any subsequent court challenge to a site-specific decision that permitted lumbering and relied on determinations contained in the Wayne Forest Plan in doing so, the plaintiff would be free to argue that those determinations were invalid.

Respondents may worry that, as a result of adoption of the Plan, they have fewer weapons in their arsenal with which to contest lumbering at any and all locations within the Wayne National Forest. But such psychic injuries have never been deemed to constitute the "injury in fact" necessary to establish standing. *See, e.g., Allen v. Wright,* 468 U.S. at 754-56.

Nor may the Sierra Club meet the "injury in fact" requirement by alleging some sort of procedural injury. The argument appears to be that the NFMA and NEPA are intended to safeguard the rights of private citizens to view National Forests and that citizens suffer a cognizable injury when those safeguards are eliminated. *See, e.g.*, Opp. Br. 17-19. While the Court has recognized that "'procedural rights' are special" (*Defenders,* 504 U.S. at 572 n.7), it has made clear that the loss of one's procedural rights is never sufficient by itself to demonstrate injury in fact. Rather, injury in fact is absent unless the plaintiff can demonstrate that the procedural injury is likely to impair some "separate concrete interest" (s)he possesses. *Id.* at 572. As explained above, the Sierra Club cannot make that demonstration in this case because there is no way to predetermine (based on the Plan) where, within the Wayne National Forest, timber sales will be permitted and thus whether any of its members might suffer injury to their aesthetic interests.

Amici commend to the Court a recent opinion of the United States Court of Appeals for the District of Columbia Circuit that considered at length the "injury in fact" showing required of a plaintiff claiming standing under NEPA to challenge a government agency's failure to prepare an adequate EIS. In *Florida Audubon Society v. Bentsen,* 94 F.3d 658 (D.C. Cir. 1996)(*en banc*), the D.C.

Circuit addressed a claim that the Treasury Department violated NEPA by failing to prepare an EIS in connection with a rule granting tax credits for use of ETBE, a fuel additive derived from ethanol. The plaintiffs complained that the rule would stimulate increased production of corn and sugar (crops necessary in producing ETBE) and that the environmental consequences of that increased production would result in injury to their aesthetic interests.

The D.C. Circuit recognized that the plaintiffs' aesthetic interests in viewing the wilderness areas they frequented could, in a case in which those interests were truly threatened, serve as the basis for a finding that the plaintiffs had suffered "injury in fact." The court nonetheless held that the plaintiffs -- despite their claims that the Treasury Department had ignored procedural protections afforded them under NEPA -- had failed to demonstrate the requisite "injury in fact" because there was insufficient evidence that the alleged procedural violations would cause environmental damage at any location regularly viewed by any plaintiff. *Id.* at 666-68. The D.C. Circuit concluded:

> Unless an EIS plaintiff at least shows, through competent and sufficient evidence, that the omission of an EIS may cause a government actor to overlook a demonstrably increased risk of injury to a personal and particularized environmental interest of the plaintiff, *and* that there is a substantial probability that the government act allegedly implicating the EIS requirement will cause that demonstrably increased risk of injury, that plaintiff cannot have standing.

Id. at 672. Once it is recognized (as this Court did in *Defenders*) that a violation of one's procedural rights is insufficient by itself to establish "injury in fact," the rule

established by the D.C. Circuit makes eminent sense. As the D.C. Circuit explained:

> Not to require that a plaintiff show that its particularized injury resulted from the government action at issue would effectively void the particularized injury requirement. After all, any plaintiff may allege an injury to its own interests if that injury need not be caused by any act of the defendant.

Id. at 669.

The Sierra Club cannot make the showing required by *Florida Audubon*. The Wayne National Forest encompasses more than 200,000 acres in southern Ohio. Less than 1% of that acreage has been subjected to clearcutting since adoption of the Wayne Forest Plan in 1988. U.S. Br. 17. Based on that evidence, it cannot be said that *any* of the acreage within the Wayne National Forest had a "demonstrably" increased risk of being clearcut (or harvested in any other manner) as a result of the procedural violations alleged by Respondents, much less that the particular acreage frequented by Respondents' members faced such a risk.[4] Moreover, the Sierra Club has made no attempt to quantify the lumbering activity that would have occurred after 1988 had a proper EIS been prepared; in the absence of such evidence, one cannot begin to determine

[4] The affidavits recently filed by Sierra Club members in the district court do not show otherwise. To the extent that Respondents are asserting procedural injury, the critical issue (for purposes of determining standing) is not whether the affiants were affected by post-1988 lumbering in the Wayne National Forest, but whether the alleged procedural violations cause a demonstrably increased risk of injury.

the degree to which the alleged procedural deficiency demonstrably increased Respondents' risk of injury.

Assuming that at least one Sierra Club member had an aesthetic interest in viewing any specific portion of the Wayne National Forest that has been lumbered, or imminently will be lumbered, the Sierra Club can demonstrate injury in fact for purposes of challenging the site-specific approval granted by the Forest Service for lumbering at that site. But there can be no basis for bootstrapping such standing into standing to challenge the entire Wayne Forest Plan. As the Court emphasized in *NWF*, "Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administrative process only when, and to the extent that" a specific action has an "actual or "immediately threatened effect" on the plaintiff. *NWF*, 497 U.S. at 894.

B. Any Injury Suffered by Respondents Is Not "Fairly Traceable" to Adoption of the Wayne Forest Plan

In support of its allegation that it has been injured by adoption of the Wayne Forest Plan, the Sierra Club identifies as the source of its injury programmatic decisions contained in the Plan regarding both the quantity of lumbering and lumbering techniques to be undertaken. For many of the same reasons cited in the previous section, Respondents have not demonstrated the second of the three standing requirements because any injuries suffered by the Sierra Club and/or its members cannot be said to be "fairly traceable" to the Plan.

The Sierra Club's argument that it has met the "fairly traceable" requirement is based on a misreading of this Court's decision in *Bennett v. Spears*, 117 S. Ct. 1154 (1997). In *Bennett*, the U.S. Fish and Wildlife Service (F&WS) argued that the plaintiffs (a group ranch operators and irrigation districts) had failed to demonstrate that their alleged injury (an imminent decision by the Bureau of Reclamation to reduce water releases from an Oregon reservoir) was not "fairly traceable" to the F&WS's issuance of a Biological Opinion that continuation of past levels of water releases would threaten two species of fish with extinction. The Court rejected F&WS's argument, finding that (at least for purposes of defeating a motion to dismiss at the pleadings stage) the plaintiffs had adequately alleged that their injuries were fairly traceable to the F&WS's issuance of the Biological Opinion. *Bennett*, 117 S. Ct. at 1164-65.

The rationale underlying *Bennett*'s "fairly traceable" determination is unhelpful to Respondents. *Bennett* reasoned that even though the Biological Opinion itself did not injure the plaintiffs, the alleged injury was virtually inevitable once the Biological Opinion had been issued because the Opinion essentially "coerc[ed]" the Bureau of Reclamation into reducing water discharges from the reservoir. *Id.*[5] The record in this case does not demonstrate that lumbering at any specific site in the Wayne National Forest is the inevitable result of adoption of the Wayne Forest Plan. The evidence shows just the opposite: total

[5] For example, the Court noted that Bureau of Reclamation personnel could face criminal charges for failing to heed the Biological Opinion's recommendations, if that failure were deemed to constitute a violation of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* *Id.* at 1165.

lumbering in the Wayne National Forest since 1988 is far below levels projected in the Plan. U.S. Br. 16-17. Indeed, the Forest Service has decided to amend the Plan to bring its projections in line with what has happened in the Wayne National Forest since 1988 and what is likely to happen in the remaining years before a new Plan is put in place. Accordingly, the Plan cannot be said to have had any coercive effect on Forest Service personnel -- they clearly have not felt bound by the Plan to maintain any minimum level of lumbering in either the Wayne National Forest as a whole or at any specific site in the forest. In the absence of such coercive effect, *Bennett*'s discussion of traceability is unhelpful to Respondents.

C. Respondents' Alleged Injury Would Not Likely Be Redressed by the Remedy They Seek

The Sierra Club alleges that because the Wayne Forest Plan and its accompanying final EIS were adopted in violation of the NFMA and NEPA, their continued use should be enjoined. The Sierra Club's requested injunction against use of the Plan further demonstrates Respondents' lack of standing, because that relief would be unlikely to redress the injuries they allege (injury to their aesthetic interests brought on by continued lumbering at the Wayne National Forest).

As the Federal Respondents point out, lumbering has been a major activity in national forests ever since the national forest system was established, and federal law contemplates that such activity will continue even in the absence of a valid LRMP for a particular forest. U.S. Br. 19 (citing 16 U.S.C. § 1604(c)). Thus, were the Wayne Forest Plan ultimately held to be invalid, lumbering would continue in the Wayne National Forest pursuant to prior

management plans, and the Sierra Club's alleged injury would continue unabated.

Amici note that the Sierra Club seeks, as an additional remedy, an injunction against any further timber sales in the Wayne National Forest. Pet. App. 144a. But any such remedy is outside the scope of the statutes under which Respondents seek relief. As noted above, Congress contemplated, in adopting the NFMA, that lumbering would continue while the Forest Service went through the process of putting valid LRMPs in place. Accordingly, Congress could not have intended that deficiencies in preparing an LRMP should lead to cessation of lumbering activity that were previously permissible. Were the Wayne Forest Plan ultimately found to be deficient, the only permissible relief would be an injunction against lumbering authorized solely by the Plan. Since such relief would be unlikely to redress Respondents' alleged injuries, they lack standing to bring their claims.

II. RESPONDENTS' CLAIMS ARE NOT YET RIPE FOR REVIEW

Respondents' claims should be dismissed for the additional reason that they are not yet ripe for review.

The ripeness doctrine is designed to protect government agencies from premature judicial interference:

> The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determination unless these [remedies] arise in the context of a controversy "ripe" for judicial resolution. . . . [I]t is fair to say that its basic rationale is to prevent the

> courts, through avoidance of premature adjudication, from entangling themselves in abstract policy disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967).

Abbott Laboratories set out a detailed framework for analyzing ripeness issues. The two basic prongs of the *Abbott Laboratories* analysis address: (1) the "fitness" of the issue for judicial decision; and (2) the hardship to the parties that would result from deferring review. *Id.* The "fitness" prong in turn has three components: whether the issue presented is largely a legal one, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final. *Id.* at 149-152.

Each of these factors points strongly to a finding that this case is not ripe for review. *Amici* note that the Eleventh Circuit held that a LRMP for the Cherokee National Forest was not ripe for judicial review under circumstances virtually identical to those here. The Eleventh Circuit held that because no lumbering would occur in the Cherokee National Forest without a second stage of decisionmaking that would consider factors specific to the site at which lumbering was contemplated, ripeness was lacking because the alleged injuries were "not imminent enough for purposes of judicial decisionmaking." *Wilderness Society v. Alcock*, 83 F.3d 386, 390 (11th Cir. 1996). The Eleventh Circuit held that it was insufficient for ripeness purposes that a future injury was more likely due to

adoption of the LRMP, so long as the injury was not thereby rendered "imminent." *Id.*

For purposes of the ripeness issue, *amici* think it particularly clear that issuance of the Wayne Forest Plan did not constitute final agency action; we thus focus much of our discussion on that facet of the ripeness issue.[6] The Court has addressed the meaning of "final agency action" in several recent cases. The Court has identified the "core question" in final agency action cases as "whether the agency has completed its decisionmaking process, and whether the result of that process is one that directly affects the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992).

Both prongs of that "core question" indicate that the issuance of the Wayne Forest Plan did not constitute final agency action. First, because the Wayne Forest Plan is a long-range planning document which does not mandate any site-specific activities, it is much more properly classified as a first step in the decisionmaking process rather than as a completion of that process. The only "decision" involved in issuance of the Plan is a decision to set some general guidelines that have no binding effect in future proceedings. Second, issuance of the Wayne Forest Plan was simply not an event that "directly affect[ed] Respondents and others who wish to visit the Wayne National Forest. No lumbering operations began as a direct result of issu-

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[6] *Amici* note that if the Wayne Forest Plan does not constitute final agency action for purposes of ripeness analysis, then Respondents' claims also are not reviewable under the APA, which limits APA review to "[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (emphasis added).

ance of the Plan, and those who object to any site-specific lumbering plan are still entitled to voice their objections before any lumbering can begin at that site.

The facts of this case are highly analogous to those in *Franklin*, in which the Court determined that the challenged administrative action did not constitute "final agency action." In *Franklin*, the Secretary of Commerce had issued to the President her final report regarding the 1990 census. Respondent Massachusetts objected to the report on the ground that it employed an improper counting method, the result of which was to decrease the size of Massachusetts's delegation in the U.S. House of Representatives. The Secretary had given her report to the President, who was tasked with transmitting the report to Congress; but the President was entitled to make whatever changes he saw fit before passing the report along to Congress. The Court determined that the Secretary's report did not constitute "final agency action" because it was subject to later revision and "carrie[d] no direct consequences for the reapportionment." *Franklin*, 505 U.S. at 798. The Court determined the report to be nonfinal, even though it was the final action to be taken by the Department of Commerce with respect to the census.

So too with the Wayne Forest Plan. While it is true that the Plan was the Forest Service's final version of its long-range planning document for the Wayne National Forest, the Plan failed to make any final land-use determination with respect to *any* site within the forest. The Forest Service has subsequently felt free to override the Plan's guidelines when making specific land-use determinations, and it is in the process of amending the Plan to bring it into conformance with actual post-1988 practice within the Wayne National Forest. As in *Franklin*, the

Wayne Forest Plan "is more like a tentative recommendation than a final and binding determination." *Id.*

Similarly, in *Dalton v. Specter*, 511 U.S. 462, 470 (1994), the final report issued to the President by the Secretary of Defense and the Defense Base Closure and Realignment Commission was held not to constitute "final agency action" because the report's recommendations were not binding on the President. *See also, Bennett v. Spears*, 117 S. Ct. at 1168 (to be final, agency action must not only "mark the consummation of the agency's decision-making process" but must also "be one by which rights or obligations have been determined, or from which legal consequences will flow.")(citations omitted). In the absence of any evidence that any "legal consequences" have flowed from the Wayne Forest Plan with respect to *any* site in the forest, the Plan cannot be considered final agency action.

The Seventh Circuit arrived at a contrary view of LRMPs by focusing on temporal issues, rather than on whether LRMPs determine any legal rights or obligations. *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995). The Seventh Circuit cited *Defenders* for the proposition that a controversy should not be deemed unripe for judicial review simply because the plaintiff will not suffer injury for some time. *Marita*, 46 F.3d at 613 (citing *Defenders*, 504 U.S. at 562-64). The appeals court held that the plaintiffs' challenge to a LRMP was justiciable because "it is only a matter of time before the management plans are implemented and affect the Sierra Club's interests." *Marita*, 46 F.3d at 613. *Amici* agree with the Seventh Circuit that a case can be ripe for review even when the "direct effect" on the plaintiff is somewhat distant in time, so long as there are very strong reasons to believe that the

plaintiff will eventually be affected. However, given the Forest Service's willingness to consider anew all relevant issues in connection with proposals for site-specific activities in the Wayne National Forest, there is no basis for asserting that "it is only a matter of time" before plans outlined in the Wayne Forest Plan are to be implemented and affect Respondents' interests. Accordingly, because *Marita* is based on factual premises inapplicable to the instant case, it provides no support for Respondents' position.

The Sierra Club asserts that ripeness concerns disappear once it can be shown that some logging operations have begun pursuant to an LRMP. Opp. Br. 13-14. That approach to ripeness was rejected by the Court in *NWF;* the Court held in *NWF* that broad-ranging attacks on an agency's general policies "cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members." *NWF*, 497 U.S. at 893. Clearly, challenges to any on-going (or imminent) site-specific logging operations in the Wayne National Forest would be ripe for review. But as *NWF* makes clear, the ripeness of one such challenge does not license those pressing the challenge to seek review of underlying policy determinations (such as the Wayne Forest Plan) that do not directly affect them. *Id.* at 894.

As noted in *NWF*, those seeking wholesale reform of government policy may be "understandably frustrated" by the slow pace of such a "case-by-case approach" to ripeness determinations and by having judicial review confined to those instances in which "the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action

applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *NWF*, 497 U.S. at 891, 894. However, it is such limitations on judicial review that ensure that the federal courts do not entangle themselves in abstract policy debates that are properly the province of another branch of government.

CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court reverse the judgment of the Sixth Circuit and find that Respondents' claims are not justiciable.

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Dated: December 16, 1997

Supreme Court, U.S.
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No. 97-16

In The

Supreme Court of the United States

October Term, 1997

OHIO FORESTRY ASSOCIATION, INC.,
Petitioner,

v.

SIERRA CLUB, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMICUS CURIAE SOUTHEASTERN OHIO OIL & GAS ASSOCIATION IN SUPPORT OF THE PETITIONER

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13 pp

QUESTION PRESENTED

Amicus will address the following question:

Assuming *arguendo* that the Wayne National Forest Land Resource Management Plan ("Wayne Forest Plan") is unlawful, what is the effect on non-timber interests?

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BRIEF FOR AMICUS CURIAE SOUTHEASTERN OHIO OIL & GAS ASSOCIATION IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS CURIAE[1]

Southeastern Ohio Oil & Gas Association ("SOOGA") is an industry group representing independent small oil and gas producers in southeastern Ohio. Its purpose is to protect, promote, foster and advance the common interests of those engaged in the oil and gas industry. SOOGA has 151

[1]Pursuant to Supreme Court Rule 37.6, amicus hereby indicates that no counsel for a party in this case authored this amicus brief in whole or in part.

members, most of whom are oil and gas producers, but some of whom are engaged in allied industries.

Pursuant to U.S. Supreme Court Rule of Procedure 37.1, SOOGA believes that there is a dimension to the review of the Sixth Circuit opinion which no other party or *amicus curiae* will bring to the attention of the Court--namely, the effect of the Sixth Circuit opinion on the leasing of lands in the Wayne National Forest for the production of oil and gas.

STATEMENT OF THE CASE

In the interest of brevity, amicus curiae is omitting any detailed statement of the facts. Instead, it adopts by reference the Statement of the Case contained in Petitioner's Brief, but supplements the Statement with the following additional facts.

The Second Amended Complaint for Declaratory and Injunctive Relief requested: "that the Court declare that the plan adopted by the Defendants is unlawful...". Joint Appendix ("Jt. App."), p. 26.

The Sixth Circuit opinion concluded at Pet. App. A, p. 8a:

> [i]n light of our examination of the structure, legislative history, and purpose of the National Forest Management Act we find the Forest Service has failed to comply with the protective spirit of the National Forest Management Act. We further find that this noncompliance is an arbitrary act in excess of the statutory limitations provided in Section 1604(g)(3)(F)(v). The Forest Service's planning process, therefore, was not in accordance with the law. Accordingly, we REVERSE the district court's order for summary judgment and REMAND this case to the district court for further proceedings consistent with this opinion.

Upon remand, the Sierra Club moved for summary judgment and sought and obtained a temporary restraining order and injunction prohibiting any timbering in the Wayne National Forest.

The Sixth Circuit opinion is unclear regarding the remedy to be afforded to the Sierra Club. District Judge James L. Graham took an expansive view of the Sixth Circuit opinion and indicated at the hearing on the temporary restraining order that the entire plan was being nullified. At pp. 15-17 of the Transcript of the Proceedings held on September 5, 1997,[2] Judge Graham said:

> I understand that the two operations that are the subject of the present motion do not involve clear-cutting, but it seems quite clear to me that the decision of the Sixth Circuit in this case goes far beyond the issue of clear-cutting. Indeed, it's my conclusion that the decision of the Sixth Circuit completely undermines the entire forest plan in this case.
>
> ***

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[2]Copies of the transcript were previously lodged with the Clerk of this Court by the Petitioner.

> It's my conclusion that the court of appeals has held that the forest service is incapable of conducting an unbiased and neutral evaluation of the various considerations necessary to prepare a forest plan under the National Forest Management Act. So it would appear that the entire forest plan in this case is implicated by the Sixth Circuit decision.

The Court granted Sierra Club's motion and enjoined any further timbering activities in the Wayne National Forest.[3]

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[3]The Sierra Club and Citizen's Council on Conservation and Environmental Control in their Second Amended Complaint for Declaratory and Injunctive Relief have hinted that oil and gas may be the subject of the next attack. In paragraphs 37 and 38 of the Complaint (Jt. App. at pp. 21–22), they allege:

> 37. In Southeast Ohio the use of land for urban and agricultural purposes has been accompanied by exploitation for purposes of mineral extraction and timbering. Large sections of land have been devoted to strip mining; oil and gas development has also expanded greatly in the past decade. Timber production has occurred on both public and private lands. Despite liberal use of the land in Southeast Ohio for these primary industries, the regional economy is among the worst in the State. Extraction and exploitation have not proven to be reliable sources of stable income or employment. Yet, in disregard of these facts, the defendants justify the below cost sale of timber, in part, as purportedly necessary for the local economy. The defendants know or should know that preservation of the timber base by limiting below cost timbering will better serve the local economy. The unique recreational opportunities offered by the Wayne's mature old growth forest will provide greater economic benefits to the local community.

SUMMARY OF ARGUMENT

The Sixth Circuit opinion potentially adversely affects not only timber interests, but mining interests, recreational interests, oil and gas interests, scientific interests, and the interest of any other party who had input in the development of the Wayne Forest Plan. This Court should not allow the judiciary to substitute its judgment for that of Congress. Congress has expressly vested discretion in the U.S. Forest Service to allocate the uses of national forests among competing interests.

In this case, the U.S. Forest Service consulted all affected parties in the formulation of the Wayne Forest Plan. After considering all public input, the U.S. Forest Service proposed and approved the Wayne Forest Plan, which provides for the multiple uses of the Wayne National Forest by timber interests, oil and gas interests, the recreational community, the scientific community, and so forth.

If this Court affirms the Sixth Circuit opinion, the ramifications will be felt not only by the timber industry, but

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> 38. The mineral exploitation in the area of the Wayne has already severely and adversely affected the water supply in the region. The clear–cutting under the plan and associated road building will cause increased water run–off during periods of heavy rains and result in increased sedimentation adversely affecting the watershed. The plan and its associated environmental impact study do not contain sufficient data or analysis concerning the plans' impact on water resources. Watershed protection is lacking in the plan as is sufficient discussion of whether there is any current technology which can mitigate the plans' effect on water resources.

by the oil and gas industry and others who have an interest in the Wayne Forest Plan.

ARGUMENT

For all of the reasons identified in the Brief for Petitioner and those set forth below, SOOGA urges the U.S. Supreme Court to reverse the decision of the Sixth Circuit.

The ramifications of the Sixth Circuit's ruling are far-reaching and will likely adversely affect non-timber interests, specifically including the leasing of land in the Wayne National Forest for oil and gas production.

SOOGA was a participant in the formulation of the Plan. The final plan contained provisions which accommodated the use of the Wayne National Forest by recreational groups, scientists, timbering interests, oil and gas interests and mining interests. Although the final plan adopted on January 4, 1988 provided for leasing of land for oil and gas development, only one lease sale involving 1,000 acres has occurred.[4] All other lease sales have been halted because of the *Sierra Club* litigation.

In 30 U.S.C. Section 226(b)(1)(A), the congressional purpose to provide for development of federal properties for oil and gas is implemented in pertinent part:

> ...Lease sales shall be held for each State where eligible lands are available at least quarterly and more

[4]The Wayne National Forest has approximately 180,000 acres of land.

> frequently if the Secretary of the Interior determines such sales are necessary. ...[5]

This congressional purpose, however, is subject to 30 U.S.C. Section 226(h):

> The Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture.

In implementing 30 U.S.C. Section 226(h), the Secretary of Agriculture has promulgated regulations covering oil and gas resource development in the national forests.[6] Pursuant to the regulations, "leasing analyses" must be in compliance with the National Environmental Policy Act of 1969 and/or the National Forest Management Act of 1976.[7] Upon completion of "leasing analyses" under the applicable regulations and in conformity to the Wayne Forest Plan,[8] the U.S. Forest Service then implements the Wayne Forest Plan with respect to oil and gas development by issuing a "leasing decision for specific lands".[9] The Forest

[5]The Bureau of Land Management within the Department of Interior actually conducts oil and gas lease sales. See 43 U.S.C. Section 1731.

[6]See 36 C.F.R. Section 228.100, et seq. and 36 C.F.R. Section 219.22.

[7]See 36 C.F.R. Section 228.102(c).

[8]See 36 C.F.R. Section 228.102(e)(1).

[9]See 36 C.F.R. Section 228.102(e).

Service finally refers the specific acreage proposed to be leased to the Bureau of Land Management, which has the right to conduct lease sales.[10]

If the Wayne Forest Plan is declared unlawful, the Bureau of Land Management will be barred from selling leases for the development of oil and gas in the Wayne National Forest. That will adversely affect the local oil and gas industry and, of course, the local economy. Moreover, the revenue sharing arrangements between the federal government and state and local governments will also be adversely impacted. Pursuant to 30 U.S.C. Section 191, revenues from the sale of oil and gas leases and royalties reserved by the United States under those leases are shared with state and local governments on a 50/50 basis.

If the ruling of the Sixth Circuit is affirmed, it is probable that there will be no further development of oil and gas production in the Wayne National Forest until another new Federal Land Management Plan is approved in conformity to law, a process which takes many years.

If there is no oil and gas lease activity, there are no proceeds of sale or royalties to share with state and local governments, and the property sits idle. Since the federal government pays no state taxes, there is no revenue from the lands to fund local education. Finally, the failure to allow the implementation of the January 4, 1988 Wayne Forest Plan deprives the local economy of the economic activity associated with oil and gas development, in the way of jobs, production, taxes and revenues.

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[10] Id.

CONCLUSION

For all the above reasons, and for those advanced in the Petitioner's Brief, Southeastern Ohio Oil and Gas Association urges this Court to vacate the opinion of the Sixth Circuit and dismiss the Complaint for lack of jurisdiction; or, in the alternative, to the extent that the Court addresses the merits, it should reverse the Sixth Circuit's decision and declare the Wayne Forest Plan lawful and valid.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

QUESTIONS PRESENTED

1. Whether the Final Land and Resource Management Plan, and Final Record of Decision, for the Wayne National Forest authorize activities that "harm" plaintiffs sufficiently to satisfy the standing requirements of Article III of the United States Constitution?

2. Whether plaintiffs' challenges to the Final Land and Resource Management Plan, and Final Record of Decision, for the Wayne National Forest are ripe for judicial review?

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INTERESTS OF AMICI CURIAE[1]

Amicus Forest Service Employees for Environmental Ethics (FSEEE) is a not-for-profit membership organization with over 9,000 members concerned with proper implementation of environmental laws on our nation's forests. Amicus Zane G. Smith is a retired employee of the Forest Service and former Regional Forester for Region V, which includes all of the national forests in California. Mr. Smith also served as Director of Recreation Management in the Washington, D.C., office of the Forest Service.

Amici are in a unique position to advise the Court on the forest planning process. Mr. Smith has extensive experience with the Forest Service planning process through his prior employment as a Regional Forester. As Regional Forester for Region V of the Forest Service, Mr. Smith was responsible for final approval of all forest plans developed by national forests within the Region.

Forest Service Employees for Environmental Ethics works on a regular basis with forest planners and other professionals within the Forest Service. FSEEE attempts to provide some measure of protection for forest planners who are subject to political and economic pressure to

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[1] The parties have consented to the filing of this brief, and their written consent forms are being filed with this brief. Pursuant to Supreme Court Rule 37.6, counsel for amici hereby certifies that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, has made a monetary contribution to the preparation and submission of this brief.

skew forest plans in favor of development and away from the requirements of the National Forest Management Act.

STATEMENT OF THE CASE

Amici agree with, and hereby incorporate by reference, the Statement of the Case set forth in the brief of Respondents Sierra Club, et al.

SUMMARY OF ARGUMENT

Forest plans contain decisions that can only be made at the forest level, and that *must* be adhered to in subsequent project-specific decisionmaking. These decisions are made after interdisciplinary teams assess multiple resources on a forestwide, ecosystem basis. Such assessments cannot and do not occur at the project level.

Forest plans become effective upon adoption, and decisions made in those plans have both substantive and procedural impacts. Plans have immediate substantive impacts because they authorize activities that may be implemented without additional site-specific decisionmaking. For activities that do involve some level of additional site-specific consideration, forest plans affect how those activities will be carried out. Such activities often begin almost immediately after plan adoption.

Forest plans also have immediate procedural impacts. Decisions made in forest plans are not revisited or questioned in later site-specific decisionmaking. If legally required procedures are not followed in adopting

a forest plan, or if information required to be disclosed and considered in a forest plan is not disclosed and considered, such procedural violations cannot and will not be cured in later site-specific decisionmaking.

Withholding judicial review of challenges to forest plans until after site-specific decisions are made would undermine the planning process and result in "piecemeal" litigation that is disfavored by this Court. If plan-level decisions are revisited on a post-hoc, project by project basis, the integrity and reliability of the planning process and of forest plans themselves will be seriously undermined. Forest Service personnel need to know that the forest plans that are integral to their day-to-day management of the forest can pass judicial muster. This is particularly true in larger (mostly western) national forests, where hundreds of projects that are tiered to a particular provision in a forest plan may be undertaken simultaneously. A successful challenge to just one of these site-specific projects, based on the inadequacy of a plan-level decision, would put the remaining projects in jeopardy, regardless of their stage of development. If forest plans are to be subject to judicial review, review should occur *before* the plan is implemented, and not after projects and investments based on the plan have already begun.

Challenges to final forest plans are "ripe" for judicial review as soon as the plans are adopted. Once forest plans have been adopted, the decisions made in the plans are not revisited. The Final Land and Resource Management Plan and Record of Decision for the Wayne National Forest are just what they purport to be – final. And

because implementation of forest plans begins immediately after adoption, to the extent the plans fail to comply with legal requirements, they have immediate impacts that occur throughout the forest.

ARGUMENT

I. Forest Plans Contain Final Decisions Affecting a Wide Spectrum of Activities That Can Only Be Evaluated at the Forest Level

Forest plans such as the Wayne National Forest Plan embody final decisions with "imminent" environmental consequences throughout the forest. As stated in the Wayne National Forest Plan:

> Management direction contained in Chapter 4 of the Forest Plan will be used to analyze *any* proposal involving use of National Forest System lands. *All* permits, contracts, and other instruments for occupancy and use of the National Forest System lands *must* be consistent with the management direction in Chapter 4.

Record of Decision, Final Environmental Impact Statement, Land and Resource Management Plan, Wayne National Forest (hereinafter ROD) at 39 (emphasis added).[2] *See also* 16 U.S.C. § 1604(i) (subsequent activities must be consistent with plans); 36 C.F.R. § 219.10(e) (same). As the Forest Service admits, "the agency's adoption of a forest plan can be expected to have a significant

[2] The Solicitor General has lodged copies of the Wayne Plan, EIS, and Record of Decision with the Court.

effect on the nature and extent of subsequent timber harvesting activities. . . . " Brief for Federal Respondents at 15.

The finality and immediacy of plan-level decisions are not only expressly stated in the plan – they are dictated by the nature of the forest planning process. Forest plans represent the only opportunity for Forest Service decisionmakers to consider the cumulative impacts of interrelated activities on multiple resources across the landscape of the forest.[3] Because cumulative impacts and forest-wide consequences are addressed in forest plans, these impacts are *not* typically addressed in subsequent, site-specific proposals. *See* 16 U.S.C. § 1604(i) (project level decisions "shall be consistent" with land management plans). Decisions about appropriate levels of timber harvest, classification of lands, and the "universe" of management tools that will be made available

[3] The National Forest Management Act (NFMA) recognizes this fact, and directs the Forest Service to "use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences." 16 U.S.C. § 1604(b). The regulations implementing the NFMA require that "[r]egional and forest planning will be based on the following principles: . . . Recognition that the National Forests are ecosystems and their management for goods and services requires an awareness and consideration of the interrelationships among plants, animals, soil, water, air, and other environmental factors within such ecosystems." 36 C.F.R. § 219.1(b)(3). Plans are to be developed by interdisciplinary teams, which "shall consider problems collectively, rather than separating them along disciplinary lines." 36 C.F.R. § 219.5(a).

for future site-specific projects can *only* be made at the forest plan level.[4]

Forest plans determine, for example, which lands within the forest are "suitable" for timber harvest. *See* 36 C.F.R. § 219.14; Land and Resource Management Plan for the Wayne National Forest (hereinafter "Wayne Plan") at 4-7 (identifying 126,107 acres out of the 176,787 acre forest as "suitable" for timber production). Once lands have been classified as "suitable" for timber production, this decision is not typically revisited in subsequent project-specific decisions, and the lands are *not* considered for alternative uses, such as wilderness, that would exclude timber production.[5]

If a forest plan determines that certain lands are suitable for timber management on the basis of an illegal criterion (such as a seven year time limit for reforestation rather than a five year time limit – *see Sierra Club v. Cargill*, 11 F.3d 1545, 1547 (10th Cir. 1993)), that decision is both ripe *and* causes immediate harm. It is ripe because

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[4] Because decisions with respect to individual timber sales are not made in forest plans, the legality of such sales is separate from, but dependent on, the legality of the forest plan. The question of whether equitable relief granted for an inadequate forest plan should include specific timber sales would require a fact based inquiry. Such an inquiry would examine questions such as the extent to which a particular sale relied on the illegal components of the plan.

[5] In contrast, lands designated as *not* suitable for timber production are reviewed (at the forest level) at least every ten years to determine whether "changed circumstances" have made them "suitable" for timber production. 36 C.F.R. § 219.4(d).

it is final and not typically revisited in subsequent project level decisions. And it is immediately harmful because the *amount* of timber that is logged in every subsequent year is based on the plan's determination of the total suitable acreage available. Even if the land on which a specific sale occurs meets the "legal" five year time limit, the *amount* of that logging is based upon an overall harvest figure that has been improperly inflated using an illegal criterion in the forest plan.

Another type of decision made in forest plans and not revisited in later projects is the decision as to which management techniques will be used within a forest, and which will not. For example, Appendix B of the Wayne Plan identifies a finite list of "management indicator species" to be used as a basis for "evaluat[ing] overall effects of management activities." Wayne Plan at B-1.[6] The decision to select a particular species as an "indicator species" at the plan level has immediate consequences. It means that other species will *not* be used as indicator species, absent unusual circumstances or an amendment to the Plan. "Monitoring" begins immediately for species selected as "indicator" species in the plan, and monitoring does *not* begin, or occur at all, for species not selected as indicators. There is no provision in the NFMA, its implementing regulations, or the Wayne Plan for selecting a more appropriate indicator species on a site-specific

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[6] The selection of "management indicator species" is required by the regulations implementing the NFMA, in order to meet the NFMA's mandate that the Forest Service "provide for diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(B); 36 C.F.R. § 219.19(a)(1).

basis. Selection or exclusion of a species as an indicator species typically occurs only at the plan level, yet it has a direct effect on subsequent decisions.

Forest level decisions that affect wildlife vary from forest to forest, but they are among the most important decisions made in forest plans. A forest-wide wildlife protection scheme intended to meet the needs of an elk herd that ranges over the entire forest, for example, must look at whether the herd's needs are met in each watershed within the herd's range. Individual timber sales occurring in those watersheds may seem insignificant when considered in isolation, but may have a profound cumulative effect on the survival of the elk herd. The forest plan establishes the forest-wide protection scheme, and is the only venue where the adequacy of the scheme can be analyzed or challenged.

As we explain in greater detail in Part V of this brief, *infra*, this Court has consistently recognized a distinction between "definitive" agency actions, which are reviewable even if not yet implemented, and "tentative" agency decisions, where premature judicial review would deprive an agency of the opportunity to refine its position. *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 151 (1967). The Wayne Plan decisions challenged in this case are plainly "definitive," both as a legal and as a practical matter.

II. The Substantive Injuries Caused by Noncomplying Forest Plans Are "Imminent"

Because decisions made in forest plans are not revisited at the site specific level and site specific decisions *must* comply with the Forest Plan (*see* ROD at 39; 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e)), plan-level decisions have consequences that are not dependent on subsequent decisionmaking to take effect. These consequences occur in every post-plan project affected by the decision, and are therefore "imminent" for standing purposes. *See* 36 C.F.R. § 219.10(e) (plans shall be implemented "as soon as practicable" after approval); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, n.2 (1992) (harm is "imminent" for Article III standing purposes when "injury is certainly impending.")

The "pine warbler," for example, is assigned as an indicator species by the Wayne Plan for determining the impacts of timber sales only on the health of "conifer" forests. *See* Wayne Plan at B-3. Timber sales in "early hardwood" forests that occur subsequent to plan adoption will *not* use pine warblers as an indicator species, because the Wayne Plan assigns "ruffed grouse" as an indicator species for hardwood forests. *Id.* If pine warblers are the best indicators of the impacts of sales in hardwood forests, and are in decline, that critical fact will be ignored in site-specific decisions because those decisions will assume, as dictated by the forest plan, that ruffed grouse are the species to examine as an indicator of the health of hardwood forests.

Forest plans thus reflect not only decisions to take certain actions, but also decisions *not* to take other

actions. The project schedules and budgets for a forest simply will not include actions that have been deemed through the forest planning process *not* to "best provide opportunities for accomplishing the Forest Plan management direction" or to "achiev[e] the desired future condition." Wayne Plan at 5-1. The Wayne Forest's monitoring processes, for example, include tracking "[p]opulation trends of the management indicator species" and their relationship to habitat changes. Plan at 5-8. As soon as the Plan was issued, activities that could affect other species not on the list of "indicator" species began – and the decision not to monitor and protect those species and their habitat was "implemented." A citizen who argues that other species should have been included in this list presents the court with immediate, substantive, harm and a "ripe" challenge – one that will become no more ripe as time goes by.

This Court has held challenges to government "inaction" to be ripe in other similar contexts. In *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 142 (1939) the Federal Communication Commission "refus[ed] to change an existing situation" and "allowed a practice to continue." The FCC argued that such inaction is not subject to judicial review, but the Court rejected this theory. *Id.* Seven years later Congress specifically provided in the APA that the courts have jurisdiction to review agency *failure* to act as well as specific actions. 5 U.S.C. § 551(13) (defining agency "action" as including the "failure to act."). In 1969 this Court, citing *Rochester Telephone*, reaffirmed that an agency's decision to "maintain[ ] the status quo" is just as reviewable in court as an affirmative act by the agency. *See City of Chicago v. United*

States, 396 U.S. 162, 166-67 (1969). In *City of Chicago* the plaintiffs sought judicial review of a decision by the Interstate Commerce Commission not to investigate certain rail carriers' changes in passenger rail service. The Court made clear that, as in *Rochester Telephone*, where the plaintiff is arguing that the agency *should* be taking certain actions but is not, judicial review is appropriate. *Id.* That is true of forest plans, such as the Wayne Forest Plan, which decide *not* to adopt some sets of management options at the same time that they decide *to* adopt another set of options (for example, electing to use certain wildlife species as "indicators" and not others). Such decisions not to act are just as final, and have environmental consequences that are just as real, as any decision to sell a particular timber sale.

III. Noncomplying Forest Plans Cause Immediate Procedural Injury

Forest plans not only embody final substantive decisions that have environmental consequences that will not be altered by subsequent site-specific decisionmaking; forest plans also are developed through mandatory procedures not replicated in future site-specific decisionmaking. The agency's failure to comply with these procedural requirements causes immediate injury to the intended beneficiaries of the requirements. As this Court stated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 n.7 (1992):

> There is much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for

> redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

See also Watt v. Energy Action Educational Foundation, 454 U.S. 151, 162 (1981) ("We share California's confidence that, after experimentation, the Secretary would use the most successful bidding system . . . For this reason, we agree with California that it has standing to challenge the Secretary of the Interior's refusal to experiment with non-cash bonus bidding systems.").

Petitioner's argument that "[a] decision that too much land has been designated as suitable would not provide any assurance that any particular area will be switched from the suitable to the unsuitable class . . . " (Petitioner's Brief at 15) ignores this Court's recognition, in *Lujan, supra*, and *Watt, supra*, that noncompliance with procedural requirements creates harm sufficient for standing, irrespective of the final outcome of the required procedure.[7] The assumption that better procedures in decisionmaking will lead to better substantive decisions

[7] Procedural injury in the NEPA context occurs not only when an agency fails to prepare an EIS for a proposal that may have significant effects on the environment, but also when an agency prepares an EIS that fails to meet NEPA's procedural requirements for such documents.

underlies both the procedural requirements that Congress has imposed on the Forest Service, and this Court's discussions of how standing should be analyzed when agencies violate procedural requirements.

IV. Piecemeal Revisitation of Final Decisions Made in Noncomplying Forest Plans Will Disrupt Management of National Forests, and Will Not Remedy the Harm Caused by Noncomplying Plans

Petitioners suggest that forest plans can be amended if site-specific challenges to activities authorized in a plan reveal that the plan is deficient. *See* Brief for Petitioner at 9 ("judicial review can encompass any portions of the Forest Plan relied upon or applied in a particular timber sale decision."). Even if this was a possibility, the result of such an approach would be not only chaos in the forest planning process, but also piecemeal judicial review of a type that this Court has specifically discouraged. *See Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 764 (1989) (piecemeal litigation is "strongly disfavored"); *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 570 (1983) (noting a "general judicial bias against piecemeal litigation."). Hundreds of decisions that rely on forest plans are initiated almost as soon as plans are completed. A successful challenge to just one site-specific project, based on a plan provision relied upon by other projects, would jeopardize each project, regardless of its stage of development or level of investment. Such an approach could paralize the national forest planning process.

Forest plans are to be accompanied by Environmental Impact Statements (EIS's) prepared pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(d). *See* 16 U.S.C. § 1604(g)(1); 36 C.F.R. §§ 219.7(b), 219.10(b). Waiting for site-specific proposals before challenging plan level decisions would also result in piecemeal NEPA litigation. This would undermine the purposes of NEPA. The regulations of the Council on Environmental Quality (CEQ) anticipate an orderly "tiered" process, in which larger landscape issues are considered in programmatic EIS's and site-specific impacts are considered only in subsequent, less comprehensive, NEPA documents that are tiered to the forest plan EIS. *See* 40 C.F.R. §§ 1500.4(i), 1502.20. As this Court has recognized:

> [i]f environmental concerns are not interwoven into the fabric of agency planning, the "action-forcing" characteristics of § 102(2)(C) [the EIS requirement] would be lost. "In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning. . . . As a result . . . enhancement opportunities may be foregone and unnecessary degradation incurred." S. Rep. No. 91-296 . . . at 20. For this reason the regulations of the Council on Environmental Quality (CEQ) require federal agencies to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values. . . . "

Andrus v. Sierra Club, 442 U.S. 347, 350 (1979). "NEPA procedures must insure that environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken." 40 C.F.R.

§ 1500.1(b) (emphasis added). *See also* 40 C.F.R. §§ 1500.5(a), (f), 1502.5. "The purpose of an EIS is to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they 'retain[ ] a maximum range of options.' " *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1986). Thus, NEPA requires that an EIS be prepared "at an early stage when alternative courses of action are still possible." *Port of Astoria v. Hodel*, 595 F.2d 467, 478 (9th Cir. 1979).[8]

Postponing judicial review of plan-level decisions not only results in impractical and wasteful piecemeal judicial review – it also affects the objectivity of the ultimate site-specific decision. Justice Breyer has recognized as a First Circuit judge "the difficulty of stopping a bureaucratic steam roller, once started." *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (citing *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1156-58 (9th Cir. 1988); *Sierra Club v. United States Forest Service*, 843 F.2d 1190 (9th Cir. 1988); and *Save the Yaak Committee v. Block*, 840 F.2d 714, 722 (9th Cir. 1988)). Justice Breyer urged courts to "realize [an] important fact of administrative life: . . . as time goes on, it will become ever more difficult to undo an improper decision (a decision that, in the presence of adequate

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[8] The requirement that environmental analysis occur early in project planning is especially important when an agency prepares a programmatic EIS, such as the one for the Wayne National Forest Plan. Because of the long-term and large-scale repercussions of programmatic NEPA analysis, such analysis must be performed *prior* to irretrievable commitments of resources. 40 C.F.R. § 1502.2(f).

environmental information, might have come out differently)." *Sierra Club v. Marsh, supra*, 872 F.2d at 503.[9] Amici parties can confirm both the truth and the wisdom of these statements based upon their personal experiences within the Forest Service.

V. The Imminence of Harm From Adoption of Forest Plans Is Highlighted by Applying This Court's Tests for Ripeness

This Court has previously noted that "[t]he standing question . . . bears close affinity to questions of ripeness – whether the harm asserted has matured sufficiently to warrant judicial intervention." *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975). In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), this Court stated that ripeness "is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Although the *Abbott Laboratories* plaintiffs were challenging a new rule governing drug labeling before the agency had attempted to enforce the rule, the Court found that the rule was ripe for judicial review, because the issue was fit for judicial decision and there would be hardship to the plaintiffs if judicial review was withheld. 387 U.S. at 149, 87 S. Ct. at 1516. The same is true for

[9] Although *Marsh* dealt with the availability of injunctive relief for NEPA violations, *Marsh's* reasoning is directly applicable to the instant case, where the agency is asking this Court to delay judicial review of a forest plan until a site-specific action is challenged, and to allow the plan to be implemented in the interim.

forest plans. The plans are final and therefore "fit" for judicial review, and withholding judicial review would create hardship for *all* parties – including the Forest Service.

Requiring plaintiffs to challenge each of the Forest Service's site-specific actions instead of bringing this programmatic challenge, as the Forest Service and intervenors would have plaintiffs do, would impose a hardship both on the parties and on the judicial system. It would be virtually impossible for citizens and public interest groups to challenge each Forest Service action that they believe violates the law. In *Sierra Club v. Penfold*, 664 F. Supp. 1299, 1305 (D. Alaska 1987), *aff'd*, 857 F.2d 1307 (9th Cir. 1988), the court held that a challenge to "a longstanding and completely uniform BLM practice of approving [mining] operations under Plans of Operations without assessing their cumulative impacts" was ripe and reviewable on a programmatic level:

> Administrative appeal would not be practical; to obtain the relief they seek administratively, plaintiffs would have to file appeals on every mine approval in the Birch Creek watershed. This would impose some hardship on plaintiffs and delay relief. In contrast, the court can dispose of this claim in a single proceeding. Operating from a manageable factual record relating to broad rather than local impacts, the court is asked to rule on a broad legal question.

Id.

For purposes of conserving the resources of both the courts and the parties, it clearly makes sense to review plaintiffs' programmatic challenge. *See, e.g., Longview*

Fiber Co. v. Rasmussen, 980 F.2d 1307, 1313 (9th Cir. 1992) ("bifurcation of review is undesirable"); *Public Citizen Health Research Group v. Commissioner, Food and Drug Admin.*, 740 F.2d 21, 31 (D.C. Cir. 1983) ("[T]he integrity of the administrative process is threatened by piecemeal review"); *State of Montana v. Johnson*, 738 F.2d 1074, 1076 (9th Cir. 1984) (early interpretation of FLPMA would avoid wasting administrative resources). Postponing review of plan-level, programmatic decisions would plainly create "hardship," both for the plaintiffs and for the Forest Service.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court affirm the ruling of the Sixth Circuit that plaintiffs have standing to seek judicial review of the Final Land and Resource Management Plan, and Final Record of Decision, for the Wayne National Forest. Amici also request that the Court affirm the Sixth Circuit's ruling that the Plan and ROD are ripe for judicial review.

Respectfully submitted,

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No. 97-16

In The

Supreme Court of the United States

October Term, 1997

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

v.

SIERRA CLUB, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR *AMICI CURIAE* INSTITUTE FOR FISHERIES RESOURCES AND THE PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INC., IN SUPPORT OF RESPONDENTS SIERRA CLUB AND CITIZEN'S COUNCIL ON CONSERVATION AND ENVIRONMENTAL CONTROL

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QUESTIONS ADDRESSED BY *AMICI*

Amici will address the following questions:

1. Should there be standing to obtain judicial review with regard to the legality of Land and Resource Management Plans ("LRMPs") adopted by the U.S. Forest Service pursuant to the National Forest Management Act (16 U.S.C. §§ 1600-1614) following their adoption but prior to approval of site-specific projects implementing those LRMPs?

2. Do challenges to LRMPs upon their adoption but prior to approval of site-specific projects meet the prevailing standards for "ripeness"?

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INTERESTS OF *AMICI CURIAE*

The Pacific Coast Federation of Fishermen's Associations, Inc. (PCFFA), is the United States west coast's largest organization of commercial fishermen, composed of 25 different commercial fishermen's port associations, marketing associations and vessel owners' associations with thousands of members who are commercial fishermen from San Diego to northern Alaska. It is a nonprofit trade association incorporated in the State of California since 1976. Fishermen belonging to PCFFA member organizations engage in a variety of west coast commercial fisheries, including those for salmon, crab, pink shrimp, albacore, rockfish, shark, halibut, swordfish, sea cucumber, sea urchin, squid and herring. Many of these species – in particular Pacific salmon, one of the most valuable fishery resources – are directly or indirectly affected by management activities on federal lands.

The Institute for Fisheries Resources (IFR), founded in 1992, is a nonprofit organization dedicated to the protection and restoration of marine and anadromous fish resources throughout the west coast, and is closely affiliated with PCFFA, including managing and expanding PCFFA's fishery conservation and watershed protection and restoration programs throughout the west coast.

In this brief, *Amici* discuss the policy and natural resource protection implications for the nation's fisheries of denial of judicial review of Forest Service LRMPs prior to the approval of on-the-ground operations. We do not address the merits of the case in chief.

STATEMENT OF THE CASE[1]

A detailed and accurate statement of the case and proceedings below is contained in the *Brief in Opposition for*

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[1] All parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *Amici* certify that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *Amici Curiae* or their counsel, has made a monetary contribution to the preparation and submission of this brief.

Respondents Sierra Club and Citizens Counsel on Conservation and Environmental Control on pages 1-11. *Amici* incorporate that Statement of the Case herein by reference.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Constitutional, statutory and regulatory provisions applicable to this case are included and reprinted in Appendix H to the Petition and in Appendix A to the *Brief in Opposition for Respondents Sierra Club and Citizens Counsel on Conservation and Environmental Control* already filed with this Court.

STANDING AND RIPENESS ISSUES PRESENTED BY THIS CASE

Amici address whether challenges to the legality of Land and Resource Management Plans ("LRMPs") upon their adoption by the U.S. Forest Service under the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600-1614, but prior to approval of site-specific projects implementing the LRMP, meet existing standards for justiciability, including standing and "ripeness" for review.

We contend that, under existing precedent and in order to fully carry out the substantive and procedural policies and requirements of NFMA without consuming excessive judicial and public resources, judicial review of these final plans prior to the approval of specific projects should be provided, and further that such challenges are clearly justiciable as meeting both the standing and "ripeness" standards. We do not address the merits of the case in chief.

I. IMPACTS OF NATIONAL FOREST MANAGEMENT ON COMMERCIAL FISHING INDUSTRY AND SPORTFISHING INDUSTRY INTERESTS

Both commercial and recreational fishermen and their allied fishing businesses have a direct and immediate financial interest which is affected by U.S. Forest Service LRMPs

in a variety of ways. These economic interests are directly threatened when forest management plans allow excessive timber harvests or allow other activities to occur on these lands which damage fragile aquatic resources.

The mainstay of the west coast commercial and recreational fishing industries has long been the Pacific salmon.[2] Most salmonids are "anadromous." This means that salmon eggs are hatched and the young reared for the first portion of their life cycle *only in freshwater streams* (primarily in forested areas). As juveniles they then migrate downstream to occupy salt water estuaries and coastal wetlands, where they adapt to ocean conditions. They then spend their next 3 to 5 years growing to maturity in the ocean, after which they migrate back to their native river systems, eventually returning back to the very same stream from which they were spawned in order to lay their eggs for the next generation.

Salmon are genetically adapted to their particular river system like a key fits a lock. Each particular "stock" of salmon (the designation given to a salmon run from a particular river system) has been equipped by millions of years of evolution to best survive in its own particular stream environment. Dramatically changing the conditions in its native watershed (as through extensive logging or overgrazing) greatly decreases a salmon stock's chances for long-term survival.

Pacific salmon are especially sensitive to the health of their inland watersheds. The life needs of the various salmonid species vary, but several – in particular coho salmon, cutthroat and steelhead – are particularly dependent on

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[2] As used herein and as most commonly used, the term "salmon" means any of seven (7) major species of fish which are members of the genus *Oncorhynchus*, which includes chinook or king salmon (*Oncorhynchus tshawtscha*), coho or silver salmon (*Oncorhynchus kisutch*), coastal searun cutthroat (*Oncorhynchus clarki clarki*), steelhead (*Oncorhynchus mykiss gairdneri*), chum salmon (*Oncorhynchus keta*), pink salmon (*Oncorhynchus gorbuscha*), and sockeye salmon (*Oncorhynchus nerka*). As a genus these species are also often lumped together and called "salmonids."

upriver forest habitat. Salmon need abundant cold, clear water, widespread gravel beds with little fine silt, and abundant pools in which to lay their eggs and where their young can find food and shelter. Most of these characteristics can now only be found in abundance in old-growth forests (i.e., trees generally in excess of 120 years of age). Almost none of this type of virgin forest still occurs on private lands. Throughout the Pacific coast, the best remaining spawning and rearing habitat for Pacific salmon is now on federal lands, particularly those under control of the U.S. Forest Service. Habitat on private lands has been far more severely damaged than the remaining salmon habitat on public lands.

Logging (particularly on steep hillsides) can greatly increase the total amount of silt in a river system, which smothers salmon eggs and kills the juveniles. Logging also can deprive the stream of overhanging trees for shade, which in turn can increase water temperatures to the point where their native streams become fatal to young salmon. Moreover, logging also increases the frequency and severity of flooding and simplifies stream habitat to the point where it can become impoverished in the basic habitat characteristics salmon must have to survive.

The importance to salmon and other aquatic resources of federal lands in the west coast was recently recognized by federal agencies in the landmark scientific report *Forest Ecosystem Management: An Ecological, Economic, and Social Assessment* (July 1993), issued by the Forest Ecosystem Management Team (the "FEMAT Report"). The FEMAT team was a prestigious scientific panel commissioned by several federal agencies as part of the Northwest Forest Plan. The Northwest Forest Plan itself is a joint U.S. Forest Service and Bureau of Land Management broad scale land management plan for dealing with federal lands within the range of the northern spotted owl (most of the west coastal region from northern California to Puget Sound). The FEMAT Report concluded:

> Over the last century, federal land within the range of the spotted owl has become increasingly important for ensuring the existence of high quality aquatic resources. Privately held forest lands have been developed into farms, urban areas, transportation corridors, and industrial forests. Conversion of native forest to tree farms and agriculture decreases the capacity of these lands to supply high quality aquatic resources. Thus, society's reliance on federal forest lands to sustain aquatic resources continues to grow. Congress recognized the role federal lands play through the Organic Act of 1897, establishing the National Forest Reserves for the 'purpose of securing favorable conditions of water flows. . . . for the use and necessities of the citizens of the United States.' (FEMAT Report, at V-2)

Largely as a result of widespread inland habitat destruction by human activities, Pacific salmon are now in the midst of an *ecological crisis of unparalleled magnitude.* Many of these valuable wild salmon runs are now facing extinction. According to a 1991 comprehensive scientific stock assessment by the American Fisheries Society (the largest organization of fisheries scientists in the world), of more than 400 once known stocks *at least 106 major populations of salmonids on the West Coast are already extinct.* The AFS report also identified 214 of the remaining native naturally-spawning salmonid stocks as "at risk of extinction" in the Northwest and Northern California: 101 at high risk of extinction, 58 at moderate risk of extinction, and another 54 of special concern, plus 1 run at that time already listed under the federal Endangered Species Act (Nehlsen, et al., "Pacific Salmon at the Crossroads: Stocks at Risk from California, Oregon, Idaho, and California," *Fisheries* Vol. 16, No. 2 at 4-21 (March-April, 1991)). Since that 1991 report was written, two additional coho populations, several sockeye and chinook salmon populations in the Columbia River, a coastal subspecies of searun cutthroat, and several steelhead populations have also been listed under the federal ESA.[3]

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[3] The winter run chinook salmon stock was listed in the Central Valley of California at the time of the AFS report by emergency listing August 4, 1989 (54 Fed. Reg. 32,085) later made permanent, and the Snake

The FEMAT Report also noted the importance of federal lands specifically for protecting anadromous salmon species:

> Although several factors are responsible for declines of anadromous fish populations, habitat loss and modification are major determinants of their current status. Of the 314 at-risk anadromous salmonid stocks identified within the range of the northern spotted owl, only 55 occur solely on non-federal lands. Thus, federal agencies share in the responsibility for managing habitat for the other 259 at-risk stocks. (FEMAT Report, at V-2)

Roughly speaking, on average we have lost at least 80% of the productive capacity of salmon streams on the west coast as a direct result of various causes of watershed destruction, including excessive logging:

> Aquatic ecosystems in the range of the northern spotted owl exhibit signs of degradation and ecological stress. . . . Approximately 55 percent of the 27,000 stream miles examined in Oregon are either severely or moderately impacted by nonpoint source pollution [cite omitted]. Over one-third of Washington State's wetlands have been lost [cite omitted], and 90 percent of those remaining are considered

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River sockeye salmon was listed shortly afterwards on November 20, 1991 (56 Fed. Reg. 58,619). Snake River fall and spring/summer chinook stocks were listed in the Columbia River on April 22, 1992 (57 Fed. Reg. 14,653). The Umpqua Basin searun cutthroat in southern Oregon was listed on August 9, 1996 (61 Fed. Reg. 41,514). Coho populations in Central California and spanning the California-Oregon border were listed on October 31, 1996 (61 Fed. Reg. 56,138) and May 6, 1997 (62 Fed. Reg. 24,588) respectively. Steelhead stocks were listed in several areas on August 18, 1997 (62 Fed. Reg. 43,937), and a final decision on proposed listings of additional steelhead populations was postponed August 18, 1997 (62 Fed. Reg. 43,974) and is now due on February 9, 1998. All remaining Pacific salmon populations are undergoing a status review by the National Marine Fisheries Service and there are several listing petitions in process. By the end of 1998 every major stream and river system in California, Oregon and Washington will likely have ESA listed salmon.

> degraded [cite omitted]. . . . (FEMAT Report, at V-2)
>
> Loss and degradation of freshwater habitats are the most frequent factors responsible for the decline of anadromous salmonid stocks (Nehlsen, et al. 1991). . . . These changes result from a suite of human activities that include agriculture, *timber harvest* and associated activities, road construction, livestock grazing, water withdrawal and diversions, and dams. . . . *On federal lands, the most significant management activities affecting fish habitat are timber harvest and associated activities.* (FEMAT Report, at V-11, emphasis added)

In a recent mapping study of presently occupied habitat versus historical habitat, based on the AFS data and updates, and using the federal ESA definitions of "endangered" and "threatened," the data indicated the following distributions and population assessments across the landscape by salmon species:

Status of Salmon Species in the Pacific Northwest & California
Current Distribution as a Percentage of Historic Habitat[4]

Species	Extinct	Endangered	Threatened	Of Special Concern	Not Known to be Declining
Coho	55%	13%	20%	5%	7%
Spring/Summer Chinook	63%	8%	16%	7%	6%
Fall Chinook	19%	18%	7%	36%	20%
Chum salmon	37%	16%	14%	11%	22%
Sockeye	59%	7%	3%	16%	15%
Pink salmon	21%	5%	<1%	<1%	73%
Sea-run Cutthroat	6%	4%	61%	29%	0%
Winter Steelhead	29%	22%	7%	18%	24%
Summer Steelhead	45%	5%	5%	27%	18%

[4] Distribution maps were prepared by scientists on contract to The Wilderness Society, and were published in The Wilderness Society's report *The Living Landscape: Pacific Salmon and Federal Lands (Volume 2)*, Bolle Center for Forest Ecosystem Management (October 1993). When data upon which to determine status was simply inadequate, stocks were classified as "not known to be declining." However, this is not to say that some of these stocks might not also be in decline, only that sufficient data was not available with which to make a judgment. The report and data were peer reviewed.

In other words, Pacific Northwest salmon are already extinct in 38% of their historic range, and *in only 6% of their historic habitat range are fewer than 50% of these salmon species at risk or extinct.*[5]

With private land habitat so severely degraded, federal lands now play a crucial role in protecting and maintaining the remaining wild salmon runs on the west coast. Throughout the current range of coho salmon, for instance, some 2,478,000 acres of its range is on federal land in the State of Washington (22% of the total), 3,505,000 acres is on federal land in Oregon (38% of the total range) and 3,566,000 acres is on federal land in northern California (35% of the total range).[6] Furthermore, these federal lands contain the last best spawning and rearing refuge areas for this species. Salmon spawning and rearing habitat on federal lands is much less fragmented and degraded than on surrounding private lands.

For many decades federal land managers in the upper Columbia region where many salmon spawn have permitted serious overcutting of timber and overgrazing in key aquatic areas, and thus have been the cause of extensive loss of salmon spawning and rearing habitat. A recent scientific assessment report (November, 1996) published as part of the Interior Ecosystem Basin Management Project entitled *Status of the Interior Columbia Basin: Summary of Scientific Findings* indicates the magnitude of aquatic problems created by past federal lands management in the Upper Columbia Basin:

> A total of 142 fish taxa are reported within the Basin. . . . Aquatic habitat fragmentation (impassable obstructions – including dams, temperature increases, and water diversions) and simplification (channelization, removal of woody debris, channel

[5] The one exception to this extinction trend is pink salmon, which however occurs in the Northwest only in the extreme upper portion of the Puget Sound area in limited populations. These are also areas least affected by human development since they are in Olympic National Park.

[6] *The Living Landscape, supra*, note 4.

> bed sedimentation, removal of riparian vegetation, and water flow regulation) have resulted in a loss of diversity within and among native fish populations. . . . The composition, distribution, and status of fishes within the Basin is very different than it was historically. Some forms are extinct and many others, especially anadromous fish, are extirpated from large portions of their historical range. . . . Wild chinook salmon and steelhead trout are approaching extirpation in a major part of the remaining distribution. (106-107)

In addition to various salmon species, there are many other inland (nonanadromous) fish species throughout the western U. S. which are directly or indirectly affected by federal lands management. Many past federal land management practices have been highly destructive for fish. Within the study area of eastern Washington, eastern Oregon, Idaho and some of western Montana, for instance, the EPA found that 7,515 stream miles are water quality impaired on lands managed by the U. S. Forest Service, and 2,142 additional stream miles are water quality impaired on Bureau of Land Management lands. (*Status of the Interior Columbia Basin, id.,* 103)

Fishing is also a wetlands-dependent industry. Wetlands are the nursery areas for many valuable fish species. An estimated seventy-one (71%) percent of this nation's entire commercial fish and shellfish resource are wetlands-dependent.[7] Most inland recreational fisheries are also wetlands-dependent. Without protection of this nation's wetlands, however, much of this economic resource would simply disappear.

Federal land management can affect wetlands in many ways. Not only are many remaining important wetlands areas now on federal lands, but siltation from logging operations on federal lands can wash into critical downriver or marine estuaries and destroy key nursery areas for a wide variety of

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[7] From the EPA Office of Wetlands' estimates of value of commercial fish landings.

valuable fish and shellfish. Examples of commercially valuable species that are either wetlands or estuarine dependent for part of their life cycle are salmon, dungeness crab, pollock, halibut, shrimp, menhaden, bluefish, bass, and lobsters, as are most inland game fish, such as trout.

The FEMAT Report also identified a number of non-salmonid fish species placed at risk or affected by federal land management:

> Some resident fish populations have exhibited declines similar to those in anadromous salmonid stocks. We identified eight resident fish species within the range of the northern spotted owl that are at risk. Two, the Klamath shortnose sucker and the Lost River sucker, are listed under the Endangered Species Act. These species are found on the edge of the range of the northern spotted owl and their habitat is indirectly affected by timber harvest activities on federal lands. Five fishes are currently candidates for listing under the Endangered Species Act: the Oregon chub, the Olympic mudminnow, the Jenny Creek sucker, the McCloud River redband trout, and the bull trout. . . . Habitat loss and degradation are principal causal factors in declines of these fishes [cite omitted]. (FEMAT Report, at V-11)

Nor are west coastal habitat losses the only problem. Our entire nation's inland freshwater fish resource is also in serious trouble. According to studies by the American Fisheries Society, roughly *one-third of 790 known species of freshwater fish in the U.S. are in danger of extinction or of special concern.* In the case of a whole separate family of nonanadromous (i.e., resident) salmonids, more than 50% of all known U.S. species in that family are close to extinction. Within the largest known family of fish (the *Cyprinidae*), which include 29.2% of all known fish species in the U.S., the number of species classifiable as endangered (7.2%), threatened (9.4%), of special concern (10.8%) or already extinct

(3.3%) totals *30.7% of this entire large family of fish species.*[8] Many of these species are directly or indirectly affected by federal management activities (in particular timber harvesting) on surrounding federal lands. Federal land timber harvests particularly can adversely affect downstream water flows, increase water temperatures or produce tons of silt downstream to smother key fish spawning areas and kill juvenile fish in large numbers.

The productive capacity and economic value of salmon as a resource has historically been enormous. Even as recently as 1988, and in spite of already serious stock declines in the Columbia and elsewhere, the Northwest salmon industry (including both commercial and recreational components) still supported an estimated 62,750 family wage jobs in the Northwest and Northern California, and generated $1.25 billion in personal income for the region.[9] This represents a national resource of **roughly $39.5 billion in economic value** from salmon harvests alone – just from northern California and the Pacific Northwest.[10]

Since 1988, however, the rapid collapse of many wild west coast salmon runs has caused severe job losses in both the commercial and sportfishing industries. This has led to severe economic distress throughout coastal and many inland communities. After several years of increasingly severe restrictions, coho commercial salmon fisheries were closed down completely in California, Oregon and Washington by 1994. Chinook fisheries (based mostly on hatchery fish) are

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[8] These numbers are all from the American Fisheries Society, "Status of Freshwater Fishes of the United States: Overview of an Imperiled Fauna." *Fisheries*, Vol. 19, No. 1 (January, 1994).

[9] Economic figures for salmon supported jobs are taken from *The Economic Imperative of Protecting Riverine Habitat in the Pacific Northwest* (Report 5, January 1992) published by the Pacific Rivers Council, Eugene, OR. Figures are based on official harvest statistics from the Pacific Fishery Management Council.

[10] Estimated by calculating the present value of an income stream of $1.25 billion/year based on a 3% discount rate over 100 years.

also now severely restricted so as to avoid accidental harvest of depressed wild stocks. Coastwide economic losses from these increasingly draconian salmon harvest restrictions, including (for coho salmon) complete commercial fishing closures coastwide, however necessary in order to protect weak wild salmon runs, is difficult to quantify but is likely in excess of $100,000,000/year in net economic losses to the region. These losses have hit many members of the fishing community very hard.

In addition to commercial fishing, inland sportfishing is also a major economic interest. According to a recent economic study, the sportfishing industry contributed a total of $108 billion in 1996 in personal income to the overall national economy. These economic contributions were heavily concentrated in western states: California ($7,128 million), Oregon ($1,173 million), Washington ($1,358 million), Alaska ($957 million), Idaho ($462 million) and Montana ($448 million) – a total of $11,526 million in personal income impacts in 1996 from these states alone. These are also states which have among the heaviest concentration of federally managed forestlands.[11]

Fishing (both commercially and for recreation) is big business in the United States. The key to protecting much of this industry is the proper management of federal lands to preserve and protect economically valuable aquatic public resources.

II. FOREST PLANS MAKE FINAL DETERMINATIONS AND DICTATE SPECIFIC ON-THE-GROUND ACTIONS WHICH CAN RESULT IN CONCRETE HARM TO FISHERIES RESOURCES.

Forest management plans, far from being vague and non-binding, are often highly specific as well as legally binding on future management decisions. There are many specific and

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[11] The 1996 Economic Impact of Sport Fishing in the United States, American Sportfishing Association (1997).

concrete statutory requirements, both substantive and procedural, governing just *what* an LRMP must contain, *how* it should be developed and how it is to meet *both* NEPA requirements as well as the requirements of NFMA and other applicable statutes. Many of these are contained in 16 U.S.C. § 1604(g).

The Forest Service has adopted a number of regulations by which to implement 16 U.S.C. § 1604(g) which are themselves even more specific and detailed with respect to what a forest LRMP must contain. These voluminous requirements are found at 36 C.F.R §§ 219.1 through 219.29. It should be reiterated that the stated purpose of these LRMPs is to be in themselves the final determination for many important land use issues:

> Plans guide all natural resource management activities and establish management standards and guidelines for the National Forest System. *They determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management*. . . . (36 C.F.R. § 219.1(b), emphasis added)

Finally, all future operations on the ground are not only predetermined by, but are *required* to be consistent with the underlying LRMP:

> Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands *shall be consistent with the land management plans*. (16 U.S.C. § 1604(i) – emphasis added)

Forest plans make many final management decisions that directly affect aquatic ecosystem health and the nation's fisheries. These decisions, including the examples discussed below, can only be made in a planning document that encompasses a watershed or landscape scale. *None of these decisions can or will be available for judicial review at the later site-specific stage*. Some examples of these types of plan-level decisions follow:

A. Forest Management Zoning:

Forest plans provide the overall management direction and general guidelines for national forests for ten to fifteen years. 16 U.S.C. § 1604(b); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1511 (9th Cir. 1992). Each plan is a strategy for managing the forest in an environmentally sound manner to produce goods, services, and amenities in a way that maximizes long-term public benefits. Each plan provides for coordinated multiple-use management of outdoor recreation, range, timber, watershed, wildlife and fish, minerals, and wilderness resources.

One way LRMPs control forest management is through a process of management zoning. Through the forest planning process, the Forest Service determines the uses to which each acre of national forest land will be put. These basic land-use designations attempt to balance competing interests and uses. For example, plan level land-use designations dictate on which lands and how timber harvests will be conducted. 36 C.F.R. § 219.14. These timber harvest decisions determine how fisheries and other aquatic protection measures will be prioritized because an area dedicated to timber production will not be an area dedicated to aquatic protection and restoration.

These zoning determinations can have direct and immediate consequences for aquatic habitat and species. For example, the LRMP for the Nez Perce National Forest in Idaho allocates 75% of the forest's remaining roadless acres to development and timber harvest. Roadless areas provide the last large blocks, outside of designated wilderness areas, of unimpacted salmon habitat in many national forests. If left untouched, these areas may become cornerstones for population restoration and recovery; if disturbed, they will further thwart efforts to restore fish habitat. The only assessment of how to manage these roadless areas across the landscape occurs in the forest management plan itself. If that assessment is incomplete or arbitrary, later site-specific decisions will not cure the defects nor change the rationale for the plan level decisions. Indeed, plan level decisions, such as opening

roadless areas to timber harvest, grazing, or mining, will not be revisited during later site-specific decision making.

B. Species Viability Determinations:

Under NFMA, the survival and viability of species within the plan area must be assured in the plan itself. 16 U.S.C. § 1604(g)(3)(B). NFMA regulations at 36 C.F.R. § 219.19 require that:

> Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.

Likewise, pursuant to 36 C.F.R. § 219.27(g):

> Management prescriptions, where appropriate and to the extent practicable, shall preserve and enhance the diversity of plant and animal communities, including endemic and desirable naturalized plant and animal species, so that it is at least as great as that which would be expected in a natural forest and the diversity of tree species similar to that existing in the planning area.

The scope and legitimacy of these species viability determinations are clearly of major importance to many species, particularly to salmon species which are highly migratory and affected by activities over large ranges. These kinds of determinations, by their very nature, cannot be made on a site-by-site basis, but must be made in the context of a much larger planning area (i.e., at the "landscape scale").

If there are errors in these species viability decisions, they should be resolved at the forest plan level well before the errors in the plan can result in irrevocable damage to aquatic resources. Planning documents for specific timber sales will not provide any additional, needed information on a species' needs and the extent those needs are met throughout the forest. See *Seattle Audubon Society v. Lyons,* 871 F. Supp. 1291 (W.D. Wash. 1994), *aff'd*, 80 F.3d 1401 (9th Cir. 1996) (plaintiffs challenged forest plan's inadequacy to protect habitat to ensure viability of indicator species); *Sierra Club v.*

Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in pertinent part*; *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (same).

Further, to fulfill their NFMA viability obligations, the LRMPs establish standards and guidelines to which all other site-specific management actions must conform. With respect to aquatic species and resources, LRMPs contain a set of specific measures and guidelines, such as riparian no-harvest buffer zones or steep slope erosion controls, for the protection of aquatic resources within the plan area. LRMPs also set standards for water temperature fluctuations, additional sediment input into rivers, streams, and lakes, and restoration of vital salmon habitat components.

As with any planning process, these standards and guidelines may or may not be biologically sound. Sediment standards may be inadequate to restore salmon spawning habitat; standards may allow harmful grazing that allows cows to eat riparian vegetation that provides shade, stream channel structure, and sediment control, etc.

If these standards and guidelines fail to provide for the continued viability of fish species, these final decisions will be ripe for review upon adoption of the forest plan. These issues should, in fact, be adjudicated at the plan level to prevent irrevocable commitments to inappropriate site-specific actions. Judicial review at the plan level can address viability standards and guidelines before actual operations have commenced, when it may well be too late.

C. Forest-Wide Timber Output Levels:

Forest plans schedule continued logging, road building, mining, and grazing throughout each forest. 36 C.F.R. § 219.16. LRMPs authorize increases or decreases in logging and grazing activities within salmon habitat; LRMPs also schedule the construction and decommissioning of Forest Service roads. All of these plan level decisions dramatically impact salmon and other aquatic resources.

Issues like forest-wide roads decommissioning will *only* be addressed at the LRMP forest plan level. If a national forest

decides that a certain percentage of roads must be closed to improve aquatic habitat, that decision will be made solely in the forest plan. If that percentage is biologically too low, it will not be revisited until the plan is revised. While the Forest Service may issue a separate site-specific decision document for a particular road decommissioning, it will not address the overall road decommissioning prescription throughout the forest except through the overall management plan.

D. Monitoring:

Forest plans also establish forest-wide monitoring programs that enable the Forest Service to evaluate whether and how well the plan is achieving its intended purposes. 16 U.S.C. § 1604(g)(3)(C); 36 C.F.R. §§ 219.11(d), 219.12(k). Each plan designates certain species as management indicator species because their population fluctuations reflect the effects of management activities on particular forest and aquatic habitat types. 36 C.F.R. § 219.19(a)(1). These species are monitored to determine whether the plan is meeting statutory and regulatory requirements and achieving its objectives.

Later challenges to specific timber sales or grazing permits will not address the overall monitoring scheme, such as whether the monitoring plan will in fact produce useful data or whether the chosen indicator species functions as a valid representative of habitat health.

E. Cumulative Impacts:

As defined under NEPA regulations, "cumulative impacts" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of their source. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. See 40 C.F.R. § 1508.7. By their very nature, cumulative impacts and adoption of measures to avoid and mitigate these impacts are best addressed at the LRMP landscape scale. Any particular site-specific action may have only a very minimal impact on aquatic resources, yet it is the

cumulative effect from all such actions that, over time, amounts to serious problems. It is the cumulative effects of many such site-specific actions that may lead to catastrophic species extinction, as indeed has happened in the case of many Pacific salmon runs.

It makes no sense to attempt to ascertain cumulative impacts on an individual site basis. By their very nature cumulative impact assessments, and the development of measures and guidelines to avoid and mitigate these cumulative impacts, are best addressed – in fact can *only* be addressed – at the plan level. If these assessments are arbitrary or inadequate, the defects should be corrected in an immediate challenge to the plan itself, both to protect the resource and to promote more efficient planning and decision making.

The Forest Service itself has recognized the need to address cumulative impacts at the plan level. In Idaho, for example, the South Fork Salmon River provides critical spawning and rearing habitat for distinct subpopulations of Snake River spring and summer chinook salmon. Since the 1950's, South Fork Salmon River salmon have declined significantly, primarily due to habitat degradation caused by mining, grazing, logging, and associated road building that cause sedimentation. During the mid-1960's, massive landslides caused by past logging and road building activities buried portions of the South Fork Salmon River under three feet of dirt.

Since the landslides in the 1960's, the need for restoration of the South Fork watershed has been widely recognized by the Forest Service and other agencies. In the late 1980's, the Forest Service convened a group consisting of representatives of scientists, the timber industry, federal and state agencies, Indian tribes, and conservation groups, to negotiate a special management plan for the South Fork. After years of meetings and dialogue, this group developed "The South Fork Salmon River – An Area of Special Concern" guidelines. Both the Boise and Payette National Forest Plans include these special guidelines, which allow no new major land-disturbing actions to be scheduled in the South Fork watershed until interim sediment reduction objectives have been

achieved and restoration activities have improved in-river conditions.

These special concern guidelines, which control actions in parts of two separate national forests, made final decisions which became ripe for judicial review when the forest plans were adopted. These decisions will not be revisited at the project level, and in fact the special concern guidelines were specifically adopted to *avoid* piecemeal review at the individual project level. These are final, reviewable decisions, and delaying review would cause hardship to interests concerned with protecting fish and aquatic habitat. See *Buckley v. Valeo*, 424 U.S. 1, 117 (1976) (per curiam) (claim of impending future rulings which may damage interests was held adjudicatable as well as ripe for judicial review).

In short, many irrevocable management decisions – preferred land uses, aquatic species viability determinations and protections, monitoring, and cumulative impacts being only a few – will necessarily be made or predetermined at the landscape scale in the LRMP itself, rather than site-by-site. Individual operations will then inevitably flow from those higher level decisions.

Whether these final decisions made in LRMPs meet the applicable standards is a justiciable question of law. It makes no legal or logical sense to wait until operations commence for that review. Once a flawed plan has been formally adopted, the damage is done, the record is closed and the issue of its legal sufficiency is ripe. All future operations on the ground are required to be consistent with the underlying LRMPs. 16 U.S.C. § 1604(i). With this in mind, the Seventh Circuit (in *Sierra Club v. Marita*, 46 F.3d 606, 612 (7th Cir. 1995)) justifiably has allowed pre-operations challenges to plan level viability assessments, noting as follows:

> Once the plan has passed administrative review, the procedural injury has been inflicted. Unless a plaintiff's purported interest in the matter is wholly speculative, waiting any longer to address that injury makes little sense. Indeed, if the Sierra Club had to wait until the project level to address general procedural injuries regarding a broad issue like biological diversity, implementation of the forest plan might have progressed too far to permit proper redress.

A number of commentators have noted that forest management LRMPs under NFMA are very much like any other land use planning document:

> Once plans become final and are determined to be valid, they themselves become law. Much like zoning requirements or administrative regulations, the plans are controlling and judicially enforceable until properly revised [citing 16 U.S.C. § 1604(i)].[12]

Thus, like any other land use plan, it is appropriate that judicial review be available to determine whether such plans have been prepared in accordance with applicable laws and regulations.

III. IF THE PLAN IS SPECIFIC AND DEFINITE ENOUGH TO PASS MUSTER UNDER NEPA, IT IS SPECIFIC AND DEFINITE ENOUGH FOR A JUDICIAL DETERMINATION OF ITS SUFFICIENCY AS A FOREST PLAN

Management measures for forest management described in an LRMP also have to undergo NEPA analysis which must both ascertain and assess a wide variety of environmental impacts. The sufficiency of such documents is a question that courts must deal with all the time. It is appropriate that a court determine whether the agency acted arbitrarily, capriciously, abused its discretion or otherwise failed to act in accordance with the law. (See for instance *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974)).

It makes little sense to hold that such a description of management measures as contained in an LRMP is sufficiently *detailed* and specific to present a justiciable claim

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12 Wilkinson and Anderson, "Land and Resource Planning in the National Forests," 64 *Or. L. Rev.* 1, 74 (1985).

under NEPA, yet simultaneously somehow *too vague* to be reviewed under NFMA. If the standards and measures proposed in a plan are sufficient to meet the specific analysis requirements of NEPA, they logically should also be sufficient upon which to base judicial review as to the legal sufficiency of the plan itself.

In other words, if a plan gives rise to standing and is deemed a ripe controversy (and can therefore be judicially reviewed) in the NEPA context, then a final decision like an LRMP – containing the very same measures and impacts already analyzed under NEPA – should similarly give rise to standing and present a ripe controversy, and therefore also be subject to immediate judicial review. In both cases there is sufficient risk of adverse environmental effects to justify immediate judicial review. In fact, for any given LRMP the risks ascertained under NEPA and outlined under NFMA are one and the same.

If anything, the information required under NFMA is *more* detailed, specific and binding (not less) than that required under NEPA. Those environmental risks ascertained and discussed in the LRMP under NEPA *surely* cannot be dismissed now as purely speculative. If environmental risks are specific and concrete enough in one context (NEPA) for judicial review, how could they suddenly lack sufficient immediacy and concreteness for judicial review under NFMA?

Surely Congress must have intended NFMA planning documents like LRMPs to be sufficiently definite in their content that they would serve as a meaningful guide for future operations, and therefore were worth the costs and delay of putting them together. If they have that degree of definiteness and likely effect then standing and ripeness requirements must, of necessity, be satisfied.

Given how intertwined an LRMP is with NEPA analysis standards, we believe that NEPA case law on standing should shed some light. Under well established NEPA precedents, "injury in fact" need only be established by showing that the agency action created an *increased risk* of actual, threatened, or imminent environmental harm by the agency making its

decision, that such an increased risk of harm injures the plaintiff's particularized personal interests or that such injury was "substantially probable." (See *Committee to Save Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 1996) and *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 664-665 (D.C. Cir. 1996)). Given the nature of an LRMP, including its compelling effect on all future plan operations, these plans would clearly meet those standards.

IV. IMMEDIATE JUDICIAL REVIEW OF THE LEGALITY OF A FOREST MANAGEMENT PLAN IS WARRANTED GIVEN ITS IMPACT AND THE HIGH LIKELIHOOD OF ENVIRONMENTAL DAMAGE FROM INADEQUATE PLANS

Petitioners have noted in their brief that the Eleventh and Eighth Circuits have refused to allow pre-operations plan-level challenges, calling such challenges "unmanageable" (*Wilderness Society v. Alcock*, 83 F.3d 386, 390-91 (11th Cir. 1996) and *Sierra Club v. Robertson*, 28 F.3d 753, 758 (8th Cir. 1994)). However, at least two other Circuit Courts, both with extensive experience in reviewing such plans, have correctly concluded that such LRMP forest management plans contain numerous decisions that will, with certainty, commit or affect public resources both *in themselves* and in every later site-specific operation. For instance, the Ninth Circuit Court, in *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992), addressed this issue directly and pointed out the obvious need for such a plan level review prior to the commencement of implementing operations:

> More importantly perhaps, if the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that the plan predetermines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never. (*Idaho Conservation League, id.*, 1516)

The Seventh Circuit Court came to a similar conclusion in *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995), noting:

> [A]s the district court points out, the regulations regarding forest management plans speak in mandatory terms. * * * The plans clearly require certain projects to be undertaken and indicate what their effects may be. * * * That the Service has yet to actively *inflict* the injury through the development of site-specific projects does not render the injury 'conjectural' or 'speculative' and therefore does not deprive plaintiffs of standing to challenge the plan. * * * As the Supreme Court noted in the very sentence before it created the 'certainly impending' language on which the defendants reply; [o]ne does not have to await the consummation of threatened injury to obtain preventive relief. (611-612, citations omitted)

We believe the logic of these two holdings is compelling. Rejection of the right of immediate judicial review would effectively nullify the ability of reviewing courts to perform their accustomed role of assuring that the Forest Service does not transgress the legal limits on its discretion or commit resources in ways that undercut the Congressional policies embodied in NFMA and the Forest Service's own regulations. As the Seventh Circuit further ruled in *Marita, id.*, at 613:

> In the present case, the Sierra Club argues that the plans as a whole inadequately address biological diversity and that procedural defaults in the development of those plans may have led to that inadequacy. Waiting until an actual timber sale occurs under the plan will not clarify the presentation of issues; arguments over the plan's sufficiency as a whole or the procedures followed in developing the plans with regard to diversity are as concrete now as they will ever become. We thus hold that the Sierra Club had standing to sue.

Many decisions are either made at or predetermined solely by the LRMP. All future plan operations are in fact *required* to be consistent with those decisions. 16 U.S.C.

§ 1604(i). Thus there may already be injury in fact by the very adoption of a defective or unlawful plan. Once the LRMP has in fact been adopted, and it is an agency final action, then the record has been closed and the issue of its very legality is clearly ripe. The procedural injury, far from being merely "imminent," has in fact *already occurred*. Environmental harms which may flow from the defects in a plan are at that point clearly threatened. Threatened future harm is enough for standing and "ripeness," so long as it is likely and not merely totally hypothetical or speculative. (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1991)).

Finally, we also do not believe that *Lujan v. National Wildlife Federation* (497 U.S. 871 (1990)) is dispositive, as is asserted by Petitioners. In that case there was no "ripeness" for the very simple reason that there had been no "agency final action," only a series of individual acts by managers as part of a policy long in place. Here, however, the final adoption of a formal LRMP under NFMA and as part of the NEPA process is obviously an agency final action, and as such the judicial review provisions or 5 U.S.C. § 704 and § 706(2) are clearly triggered and should be applied.

V. RESOLUTION OF ISSUES AT THE PLAN LEVEL PRIOR TO OPERATIONS ECONOMIZES FEDERAL RESOURCES AND BETTER PROTECTS THE PUBLIC

Hundreds of site-specific operations, such as aquatic restoration projects, road building, road decommissioning, grazing, mining, and timber harvest may ultimately flow directly from a single LRMP. When measures required in a management plan are flawed, or when for any of a number of administrative reasons the Forest Service has overlooked basic issues, these errors should be brought to the attention of land managers through an appropriate judicial review process *well before* contracts are bid out, commitments are irrevocably made or operations proceed in ways that damage public resources.

The government, in its brief (pg. 32 of Federal Respondent's brief) acknowledges that once a site specific action has commenced that both that action and that portion of the underlying plan relevant to that site specific action can then be challenged in court. However, it simply makes no sense, both as a matter of judicial efficiency and in terms of economizing limited federal agency resources, to *forbid* judicial review of a potentially flawed Land and Resource Management Plan (LRMP) where that forest plan itself makes definitive and controlling decisions. Deferring the issue until site-specific actions commence simply forces potential plaintiffs to challenge *each and every site-specific action* as they occur and results in a *multiplicity of court cases*, each attacking piecemeal different parts of the overall plan.

Thus it is far better to get to the root of the problem and try to resolve these flaws in one lawsuit at the plan level first. If the problem can be resolved there, dozens of later lawsuits attempting piecemeal resolution based on specific projects will become unnecessary. Judicial economy has long been a basis for encouraging speedy judicial review, and avoiding a multiplicity of suits with potentially conflicting outcomes is generally looked on with favor by federal courts:

> [A] federal court should consider and weigh in each case, and at every stage of litigation, the values of judicial economy, convenience, fairness, and comity. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988), citing *Mine Workers v. Gibbs*, 383 U.S. 715, 726-727 (1965).

Amici and other groups that work for protection of aquatic resources would face an almost insurmountable task if they had to challenge each and every site-specific Forest Service action that affected fish and their habitat. In the Pacific Northwest, there are over 20 national forests whose forest plans impact Pacific salmon species. Each of these national forests proceeds with hundreds of individual projects each year. Indeed, west coast fishermen simply could not challenge each of these projects individually and continue to pursue their jobs as commercial fishermen.

VI. THE LEGAL PRESUMPTION MUST BE IN FAVOR OF JUDICIAL REVIEW, PARTICULARLY WITH RESPECT TO ENFORCING PROCEDURAL RIGHTS TO ASSURE AGENCY COMPLIANCE WITH APPLICABLE LAW

Adoption of a Forest Service LRMP is a final agency action. Immediate judicial review of a final agency action serves as a safeguard against agency abuse of discretion and is in fact specifically provided for under 5 U.S.C. § 704 of the Administrative Procedures Act.

Noting this provision, this Court has previously strongly stated (*Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-141 (1966)) that judicial review of a final agency action should only very rarely be cut off:

> [A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the will of Congress [cites omitted]. . . . The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other remedy in a court,' 5 U.S.C. § 704. . . . [T]his court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable interpretation' [cites omitted]. Again, in *Rusk v. Cort* [369 U. S. 367 (1961)] at 379-380, the Court held that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review.

This presumption strongly favoring judicial review has been frequently applied by this Court (see *Bowen v. Michigan Academy of Family*, 476 U.S. 667, 670-672 (1986) for an excellent discussion of the rationale for this presumption).

Essentially what *Abbott Laboratories, supra,* stands for is the rule that once an agency action which has legal effect is

finalized and the record is closed, then *at that point there is a ripe controversy* and that there are both public and private interests which favor immediate review. One of those public interests is judicial economy. Another is the governmental interest in settling disputes early rather than later. In this case all those interests are clearly apparent, and so under *Abbott Laboratories* the case is clearly ripe for review. Under *Abbott* also, this review should be granted unless there is clear and convincing evidence of Congressional intent to limit such review. However, there is no "clear and convincing evidence" of any such Congressional intent within NFMA. NFMA, far from discouraging public participation, at 16 U.S.C. §§ 1604(d) and 1612(a) actively requires it.

In fact, the ability to obtain judicial review following plan development is a natural extension of public involvement generally, and one that makes such participation meaningful. There is simply no persuasive argument for the proposition that judicial review, when granted, must always wait until operations have begun. In the *Abbott Laboratories* case, for instance, judicial review was granted to an FDA regulation well prior to any enforcement action. The mere possibility of future enforcement against the plaintiff was sufficient to find both standing and "ripeness" to challenge that regulation on its face.

This very Court has also noted that even the usual standards of judiciability, standing and "ripeness" should be much less restrictive when it comes to the enforcement of procedural rights such as the right of citizens to hold agencies accountable to law:

> There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, n.7 (1991))

That Court then used as an example the person living adjacent to the site of a proposed federal dam, who would have standing to challenge the agency's failure to prepare an EIS, "even though he cannot establish with any certainty that the statement

will cause the license to be withheld or altered, and even though the dam will not be completed for many years." (*Lujan v. Defenders of Wildlife, id.*, 572, n.7)

The full participation of the public in the management of what, after all, are *public* lands serves as an essential check against the possibility of arbitrary and capricious agency actions. It also assures better decision making, and can serve to bring errors to the attention of the agency before those errors can be perpetuated by ill considered actions. Immediate judicial review of agency final actions is an important procedural right which helps to assure the integrity of government and is a logical step which makes public participation truly meaningful. Congress mandated this type of review in 5 U.S.C. § 704 and § 706(2) for very good reasons, and under well established case law this right to judicial review should not be abridged unless there is clear and convincing Congressional intent to do so.

VII. CONCLUSION

To find that there should be no standing for review of LRMPs at the plan adoption stage, or that judicial review at the plan adoption stage is premature, would substantially undercut the substantive and procedural goals of the National Forest Management Act. Once a plan has been formally adopted and the administrative record closed, issues of whether the plan itself has complied with the law are clearly "ripe" and they will get no riper. Delay would be pointless as well as counterproductive.

Access to judicial review generally results in better decision making, brings errors to the attention of the agencies involved, and maintains the credibility and legitimacy of the governmental process. This is why there is a *very strong* presumption of judicial review of final agency actions unless there is *clear and convincing evidence of a contrary legislative intent*. No such intent appears anywhere within NFMA or in any other statute relevant to this case.

Challenging the legal sufficiency of a final agency action is also an important procedural right that should be given great

deference. The enforcement of such procedural rights is clearly "ripe" once the agency has in fact made its final action, and out of deference to the importance of those rights courts generally find standing without meeting all the normal standards of redressability and immediacy. (*Lujan v. Defenders of Wildlife, supra*, 572, n.7)

Major land use issues are either decided in or predetermined by LRMPs. Site-specific operations then flow directly out of and are required to be consistent with those decisions. Any issues about the legal sufficiency of the plan itself are best resolved at the plan level *before* operations commence in order to avoid irretrievable commitments of public resources or irrevocable environmental damage. Allowing pre-operational judicial review will improve Forest Service management as well as better protect the nation's valuable fisheries and the millions of jobs that depend on them.

Finally, in terms of judicial economy, it is far better to resolve major plan issues and to correct deficiencies in the plan itself once and for all at the plan level *prior* to operations than to require piecemeal review by way of a multiplicity of suits. The piecemeal approach means separate legal challenges to what may ultimately become hundreds of plan-based operations, complete with all the waste of agency and judicial resources such chaos would entail.

For these reasons, we believe that this Court should find that standing and "ripeness" exist for the judicial review upon plan adoption of U.S. Forest Service LRMPs and other forest management plans under the National Forest Management Act.

Respectfully submitted,

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